ORIGINAL

IN THE SUPREME COURT OF FLORIDA

LARRY W. HALL,

Petitioner,

v. Case no. 88,740

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State generally accepts Petitioner's Statement of the Case and Facts, subject to the following additions or areas of disagreement:

1. In the argument portion of his initial brief, Petitioner attempts to calculate what his guidelines score would have been had his Flagler offenses been scored as prior offenses. (Br.5)[1] It appears as though this hypothetical scoresheet is incorrect.

Petitioner's Level 8 burglary offense is assigned only 6.0 points. (Br.5) Level 8 offenses should receive 6.4 points. Sec. 921.0014, Fla. Stat. (1993). Additionally, Petitioner's two counts of aggravated assault on a law enforcement officer, Level 6 offenses, receive a total of only 8.0 points. (Br.5) They should receive 4.8 points apiece, for a total of 9.6 points. Sec. 921.0014, Fla. Stat. (1993).

Hence, the correct score, if the Flagler offenses were added, is 151.0, for a range of 92.25 to 153.75 months.

2. The record does not expressly reflect that the

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[1]"Br." indicates a citation to Petitioner's initial brief. "Tr." indicates a citation to the plea and sentencing transcripts, which are consecutively numbered. "R." indicates a citation to the rest of the record-on-appeal.

subsequent Flagler convictions were the basis for the trial court's decision to depart. The trial court wrote the following as his second ground for departure, "Primary offense is scored at Level 7 or higher and the defendant has been convicted of one or more offense that scored, or would have scored, at an offense level 8 or higher." (R.115)

The trial court did not specify what offenses it relied upon. However, when asking the trial court to depart because of a conviction of a level 8 or higher offense, the prosecutor specifically alluded to an Oklahoma conviction for armed robbery. (Tr.44) Petitioner did not object or otherwise challenge the State's assertion that he had a prior conviction for armed robbery in Oklahoma.

Additionally, it appears that Petitioner had a lengthy prior record from 1972 to 1981, but then went over ten years without a conviction until his Flagler convictions. (Tr.46)

Additionally, Petitioner's scoresheet reflects a prior conviction for armed robbery, a level 9 offense. (R.113)

SUMMARY OF ARGUMENT

POINT ONE: The issue in Point One is moot because there is a second ground for departure, the validity of which Petitioner does not challenge. Hence, even if the Court were to answer the certified question in the affirmative, limiting the extent of departure for subsequent, unscoreable offenses, it would not affect Petitioner's sentence. There would be no limit to the extent of the departure for the other departure ground.

The record does not support Petitioner's assumption that the Level 8 conviction(s) for which the trial court departed are for the subsequent Flagler offenses. Rather, the record seems to indicate that the conviction(s) supporting the departure are for **prior** offenses.

The Court should answer the certified question in the negative. The legislature has clearly and unambiguously stated that the extent of departure is not subject to appellate review. This is an issue of substantive law, which is exclusively within the legislative domain.

Puffinberger should not be extended beyond its current application.

Petitioner's thirteen-year sentence is not cruel or unusual, where Petitioner was convicted of three counts of felonies

punishable by life.

POINT TWO: The issues raised in Point Two are beyond the scope of the certified question; hence, the State urges the Court to decline to consider them. Further, neither of the issues has been preserved for appellate review. Even if the Court reaches these issues, they are without merit.

Petitioner's departure sentence does not constitute double jeopardy. Petitioner's argument on this issue is similar to double jeopardy attacks on the habitual offender statute and is similarly without merit.

Petitioner's sentence does not constitute punishment for which there is no conviction, even though his attempted murder conviction was overturned on appeal. First of all, the record does not expressly reflect that the departure sentence was based on the subsequent Flagler offenses, which included the attempted murder conviction. Even if it was, Petitioner's Level 8 armed burglary conviction was affirmed and furnishes an adequate basis for departure.

Even if there was error in the challenged ground for departure, Petitioner's sentence should nonetheless be affirmed where there is a second, unchallenged ground for departure.

ARGUMENT

POINT ONE

WHERE THE TRIAL COURT PROPERLY DEPARTS FROM THE SENTENCING GUIDELINES, THE EXTENT OF THE DEPARTURE IS NOT SUSCEPTIBLE TO APPELLATE REVIEW, NOR SHOULD IT BE.

This case is before the Court for consideration of the following question, certified by the Fifth District Court of Appeal as being of great public importance:

> IS THERE ANY LIMIT UPON A TRIAL JUDGE'S RIGHT TO IMPOSE A Ddeparture SENTENCE UNDER THE GUIDELINES BASED SOLELY ON AN UNSCOREABLE CRIMINAL OFFENSE COMMITTED *AFTER* THE CRIME BEING SENTENCED FOR, SUCH AS NOT DEPARTING BEYOND THE PERMISSIBLE SENTENCING RANGE, HAD THE LATER OFFENSE BEEN SCORED?[2]

Hall v. State, 21 Fla. L. Weekly D1621 (Fla. 5th DCA July 12, 1996)(emphasis in original). This Court should answer the question in the negative.

As a preliminary matter, the question appears to be moot in this case. Even if the Court answers the certified question in the affirmative, it will not affect Petitioner's sentence. That is because there is a second ground for departure, to wit: the offense involved multiple victims. (R.115) Although this

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[2]This certified question is also before the Court in Harris v. State, case no. 86,564.

ground, standing alone, is not included in the non-exclusive list of aggravating circumstances found at Section 921.0016(3), Florida Statutes (1993), Petitioner does not challenge its validity on this appeal.

Even if this Court answers the certified question in the affirmative, there would still be no limit on the extent of departure for this second reason. Thus, it appears that Petitioner's sentence will not be affected by this Court's treatment of the certified question. The issue is moot.

Additionally, Petitioner operates under the assumption that the conviction or convictions the trial court relied upon in departing are the subsequent Flagler offenses. There is nothing in the record to support this assumption. It is equally possible that the trial court relied on a prior offense or offenses of Petitioner.

Petitioner apparently has a prior conviction for armed robbery in Oklahoma. (Tr.44) This Oklahoma conviction is what the prosecutor specifically referred to when suggesting that the trial court depart. (Tr.44) Additionally, his scoresheet reflects one prior level 9 felony, robbery with a firearm. (R.113) Additionally, it appears that Petitioner had a lengthy prior record going from 1971 to 1982. (Tr.46) Because

Petitioner went for over ten years without a conviction, these priors could not be scored against him. Sec. 921.0011(5), Fla. Stat. (1993).

Section 921.0016(3)(r), Florida Statutes (1993), provides that a departure sentence may be imposed where "[t]he primary offense is scored at offense level 7 or higher and the defendant has been convicted of one or more offense **that scored, or would have scored**, at an offense level 8 or higher." (emphasis added.) The instant offense scored at level 9. Because there were prior convictions the trial court could have relied upon, it is unreasonable to assume, as Petitioner asks this Court to do, that the departure was based on his subsequent Flagler offenses.

Turning to the certified question, the legislature has spoken directly and clearly on this point: "[T]he extent of a departure from a guidelines sentence is not subject to appellate review." Sec. 921.001(5), Fla. Stat. (1993). This provision has already passed constitutional scrutiny by this Court. Booker v. State, 514 So. 2d 1079 (Fla. 1987). In Booker, this Court affirmed the legislature's power to remove the extent of a departure from the scope of appellate review. Id.

Petitioner asserts that the legislature has defeated the purpose of the guidelines by removing the extent of departure

from the scope of appellate review. This Court heard the same argument in Booker and rejected it. Id. at 1082.

In Booker, this Court recognized that it is within the legislature's domain to modify the scope of appellate review on those issues of which there is no inherent judicial power of appellate review. Id. at 1081. This Court further held that there is no inherent judicial power of appellate review over sentencing. Id. at 1082. Hence, the legislature may limit the scope of appellate review over sentencing issues.

> 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, an 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.

Having recognized that the sentencing guidelines are a matter of substantive law in Booker and Smith v. State, 537 So. 2d 982 (Fla. 1989), this Court may not modify Sec. 921.001(5), because only the legislature has the power to change substantive law. Benyard v. Wainwright, 322 So. 2d 473 (Fla. 1975).

Petitioner urges this Court to extend the rule enunciated in

Puffinberger v. State, 581 So. 2d 897 (Fla. 1991), to the instant case, holding that the trial court may only depart to the extent of the permissible guidelines range had the later offense been scored. In Puffinberger, this Court held that significant, unscoreable prior juvenile offenses justify a departure sentence, but only to the extent of the permissible guidelines range were the prior offenses scored. Id. at 898.

In Puffinberger, the Court did not address Sec. 921.001(5), and it is not clear that the two authorities can be reconciled. Even if Puffinberger is valid in light of Sec. 921.001(5), its rationale should not be extended beyond its current application. The policy rationale underlying Puffinberger-- i.e. insulating adults from the mistakes of their youth-- does not apply to the instant ground for departure.

Petitioner inexplicably states, "Adopting the Puffinberger rationale places a limit on the trial judge's discretion and still honors the legislative requirement of no appellate review of the extent of departure." (Br.7) On the contrary, this would completely defeat the legislative requirement of no appellate review of the extent of departure.

Petitioner appears to insinuate that his sentence constitutes cruel and unusual punishment. (Br.6) In Brown v.

State, 13 So. 2d 458, at 461, 152 Fla. 853 (Fla. 1943), this Court held that a sentence within the statutory maximum does not constitute cruel and unusual punishment, so long as the statute fixing the maximum sentence is not unconstitutional. In the instant case, Petitioner's thirteen-year sentence is well within the statutory maximum, where he was convicted of three counts of felonies punishable by life imprisonment. The statutory maximum for such offenses is forty years. Sec. 775.082(3)(a), Fla. Stat. (1993). Petitioner's sentence does not constitute cruel and/or unusual punishment.

In Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, ____ U.S. ____, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994), this Court stated, "[W]e reaffirm our commitment to the proposition that "[t]he length of the sentence actually imposed is generally said to be a matter of legislative prerogative." (Quoting Leftwich v. State, 589 So. 2d 385, 386 (Fla. 1st DCA 1991)(citing Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). The State asks this Court to once again affirm its commitment to the same proposition.

POINT TWO

PETITIONER'S SENTENCE DOES NOT CONSTITUTE DOUBLE JEOPARDY OR PUNISHMENT FOR AN OFFENSE FOR WHICH THERE IS NO CONVICTION.

In point two, Petitioner raises two claims: 1) a double jeopardy claim, and 2) a claim that his departure sentence constitutes punishment for which there is no conviction. The State urges this Court not to reach these issues, as they are beyond the scope of the certified question. See, Stephens v. State, 572 So. 2d 1387 (Fla. 1991)(Court declined to reach issue that was beyond the scope of the certified question.)

Moreover, neither of these issues has been preserved for appellate review because they were not raised in trial court or the district court; hence, this Court should refuse to consider them. Tillman v. State, 471 So. 2d 32 (Fla. 1985). However, even if the Court reaches these issues, they are without merit.

First, Petitioner makes a perfunctory double jeopardy argument, claiming that his departure sentence based upon an offense for which he has already been sentenced constitutes multiple punishment for the same offense. (Br.8) In this regard, this case is analogous to the line of cases in which the Court rejected double jeopardy challenges to the habitual offender statute.

In those cases, the defendants claimed the habitual offender statute violated the Fifth Amendment protection against double jeopardy, in that it increased a defendant's punishment due to a prior offense for which the defendant had already been punished. The Court rejected this argument, stating that the existence of the prior conviction or convictions merely showed the need for "'enhanced restraint. In this sense, therefore, the enhanced punishment is incident to the last offense alone, but for which it would not be imposed.'" Tillman v. State, 609 So. 2d 1295, 1298 (Fla. 1992)(quoting Henderson v. State, 569 So. 2d 925 (Fla. 1st DCA 1990)); See also, Merriweather v. State, 609 So. 2d 1299 (Fla. 1992); Warren v. State, 609 So. 2d 1300 (Fla. 1992); Hale v. State, *supra*. The same reasoning applies in this case.

Next, observing that his Flagler conviction for attempted second-degree murder was reversed by the Fifth District in Hall v. State, 21 Fla. L. Weekly D1805 (Fla. 5th DCA August 9, 1996), Petitioner asserts that his departure sentence constitutes punishment for which there is no conviction. (Br.8) As noted in Point One, the record does not support Petitioner's assumption that the departure was based on the subsequent Flagler offenses. Even assuming, *arguendo*, that it was, there was still an adequate basis for departing.

Although his conviction for attempted murder was reversed, Petitioner's conviction for armed burglary of a dwelling, pursuant to Section 810.02(2)(a) and (b), Florida Statutes (1993), was affirmed. Id. Armed burglary of a dwelling is a Level 8 offense according to the Offense Severity Ranking Chart. Sec. 921.0012, Fla. Stat. (1993). Hence, even with the reversal of Petitioner's attempted murder conviction, the trial court was still justified in departing on the stated ground that the "[p]rimary offense is scored at Level 7 or higher and the defendant has been convicted of one or more offense that scored, or would have scored, at an offense level 8 or higher." (R.115) Sec. 921.0016(3)(r), Fla. Stat. (1993).

Furthermore, even if Petitioner is correct that the challenged ground for departure constitutes double jeopardy or punishment for an offense without a conviction, there was still a second ground for departure which Petitioner does not challenge on this appeal. (R.115) Section 921.001(6), Florida Statutes (1993), provides in part, "When multiple reasons exist to support a departure from a guidelines sentence, the departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure." See also, Mills v.

State, 642 So. 2d 15 (Fla. 4th DCA 1994)(en banc).

Hence, even if Petitioner is correct that one ground for departure constituted punishment for an offense without a conviction, his sentence should still be affirmed because there is a second, valid reason for departure.

CONCLUSION

BASED ON THE foregoing argument and authority, the State respectfully requests this Honorable Court to answer the certified question in the negative and to affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery to Assistant Public Defender Dee Ball, Esquire, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, via the public defender's basket at the Fifth District Court of Appeal, this 30th day of October, 1996.

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