IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

FILED
DEBBIE CAUSSEAUX
SEP 08 1999
CLERK, SUPREME COURT
By

RICKY HOPE
APPELLANT/PETITIONER:

VS

CASE NO: 96-352
4th DCA CASE NO: 98-2093

ORIGINAL

STATE OF FLORIDA,
APPELLEE/RESPONDENT.

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL FOURTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

/s/ Ricky Hope
DC# 901205

APPELLANT, PRO SE
Washington Corr. Inst.
4455 Sam Mitchell Dr.
Chipley, Fla. 32428

CERTIFICATE OF INTERESTED PERSONS

The following persons have an interest in the outcome of this proceedings:

1. ROBERT BROWN (VICTIM)
2. ROBERT BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA
3. HON. ROBERT CARNEY, CIRCUIT JUDGE, 17TH JUD. CIR. FLORIDA
4. RICKY HOPE (PETITIONER)
5. RICHARD JORANDBY, PUBLIC DEFENDER, 15TH JUDICIAL CIRCUIT, WEST PALM BEACH, FLORIDA
6. HON. JUDGE KLEIN, 4TH DCA, WEST PALM BEACH, FLORIDA
7. CHRIS NARDUCCI, ESQ., COUNSEL FOR PETITIONER AT TRIAL
8. DAVID SCHULTZ, ASSIST. ATTORNEY GEN.,FLA., WEST PALM BEACH, FL
9. MICHAEL SATZ, STATE ATTORNEY, FT. LAUDERDALE, FLORIDA
10. IAN SELDIN, ASSIST. PUBLIC DEFENDER, WEST PALM BEACH, FLORIDA
11. HON. JUDGE TAYLOR, 4TH DCA, WEST PALM BEACH, FLORIDA
12. HON. JUDGE WARNER, 4TH DCA, WEST PALM BEACH, FLORIDA

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STATEMENT OF THE CASE AND FACTS

(factual & procedural history of case)

Petitioner was charged by way of Information in the Circuit Court of the Seventeenth Judicial Circuit for Broward County, Florida, for Attempted First Degree Murder with a Firearm. (Appendix Exhibit "B" at 2)

The jury found him guilty as charged and the trial court adjudicated him guilty and passed the case for a sentencing hearing (Appendix Ex. "B" at 2)

At the sentencing hearing, it was determined that Petitioner scored a total of 162 sentencing guideline points. The total was arrived at by factoring his current conviction for attempted first degree murder, a prior adult conviction for carrying a concealed weapon and grand theft and a prior juveline delinquency adjudication for robbery with a deadly weapon. An additional 40 points were assessed for severe victim injury, as well as 30 points for "prior serious felony". Based on his sentencing point total, Petitioners guideline range was between 100.5 months and 167.5 months imprisonment, with a recommendation of 134 months incarceration.

The trial court imposed a sentencing of thirty (30) years imprisonment on Petitioner. In so doing, the trial court, both orally and in writing, cited its reasons for aggravating Petitioners sentence as follows: (1) Petitioner had an excessive nonscorable juvenile record; (2) the primary offense upon

nonscorable juvenile record; (2) the primary offence upon which Petitioner was sentenced was a crime bearing a sentencing level of seven (7) or higher and he had previously been convicted of offenses of a level eight (8) or higher, specifically a juvenile adjudication for armed robbery, and; (3) Petitioner was not amenable to rehabilitation as envinced by an escalating pattern of criminal activity, specifically a pattern of violet criminal conduct beginning in 1991 with a string armed robbery, then to an armed robbery, and then to the current offence of attempted first degree murder, (Appendix Ex. "B" at 3)

In support of the trial courts reasons for imposing an upward guideline departure sentence was the result of Petitioners pre-sentence investigation (PSI). The PSI reflects that Petitioner had a history with the juvenile court system ranging as far back as August 1991. Of the 19 allegations of juvenile criminal conduct made against Petitioner, seven resulted in final judicial dispositions where a delinquency determination was made, (Appendix "B" at 3)

Of the seven, four were for felony - type crimes, while three were misdemeanor - type crimes. The remainder consisted of juvenile cases that were either resolved non-judicially, held open without any adjudication or disposition, or nolle prosed. (Appendix "B" at 3)

One of the charges the trial court used to premise its third ground for departure, the 1991 strong-arm robbery, was resolved non-judicially, while the 1992 armed robbery was "held open" with no record of any sort of dispostition. (Appendix "B" at 3)

Petitioner objected to the sentence imposed. The District Court affirmed of direct appeal. (Appendix "A" at 1)

A timely Notice to Invoke Discretionary Jurisdicion to this court was filed.

The petition herein follows.

'SUMMARY OF THE ARGUMENT

Petitioners position is simple, the decision of the Fourth District Court of Appeals directly conflicts with the decision of the First District Court of Appeals on the issues presented.

In fact, the cited cases by the Fourth District Court of Appeals expressly stated that it conflicted with the First District Court of Appeals Decision.

A resolution of the conflict should be determined by this Court under its authority of Article V, § 3 (b) (3), (4), Florida Constitution.

ARGUMENT
GROUND ONE

The decision of the district court directly conflicts with the decision of another district court on the same point of law.

The district court below cited the decision of Hyden v. State, 715 So.2d 960 (Fla App 4th Dist) (en banc). In Hyden[1], the district court below stated "We, therefore, recede from Louigeste, certify conflict with Neal and affirm the conviction of Appellant." Id at 963.

Neal is cited as Neal v. State, 688 So.2d 392 (Fla App 1st Dist 1997)[2]

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1 - Hyden would appear to hold that counsel could be deemed ineffective for failing to preserve a sentencing issue for review, of course this would now necessitate a collateral relief motion for ineffective assistancec of counsel, but thethe prisoner should not bear this problem when counsel failed to performed trhe act, an appropriate remedy is to sanction counsel on direct appeal, but grant the prisoner or defendant the relief that is apparent on the record. This ensures the fairness between the State and the defendant, when the question is a clear loss of his liberty as protected by the 14th amendment of the U.S. Constitution.

2 - Sentencing issues are usually always fundemental, for

Because they cited conflict, the case should be resolved by this Court in regards to fundemental error at sentencing and whether the matter can still be heard on direct appeal without preservation of the issue in the trial court. Neal says "yes"; Hope decision below says "no".

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2 (cont.) - they determine whether the duration of ones imprisonment as a quarantine from our society, and will always implicate issues of due process, equal protection or cruel and unusual punishment. (compare) Miller v. Florida, 482 U.S. 423 (1987) Because the matter relates to the actual structure of the Criminal Law judicial process, the issue here is not only fundemental but a "structural defect" which can be corrected at any point, see Sullivan v. Louisiana, 508 ____ U.S. ____, 113 S. Ct. 2078 (1993).

CONCLUSION

The appellant request this court to reverse appellant's conviction(s) as to **any** or all counts,. or to vacate the appellant's sentence as to **any** or all counts, and to remand for futher proceedings, if necessary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been sent by First Class US mail to:, David Schultz, Assistant Att'y, Gen 1655 Palm Beach Lakes Blvd, West Palm Beach, Floorde 33401

this 3rd day of September **1999.**

Nicky Hope #901205

APPELLANT / pro se

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1999

RICKY HOPE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 98-2093

Opinion filed July 14, 1999

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert B. Carney, Judge; L.T. Case No. 96-16090 CF 10 A.

Richard L. Jorandby, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and David M. Schultz, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Appellant, Ricky Hope, was convicted by jury of attempted first degree murder and sentenced to the statutory maximum of thirty years imprisonment. We affirm the upward departure sentence upon our finding that one of the reasons given by the trial court for departure is valid - i.e., that appellant is not amenable to rehabilitation as evidenced by an escalating pattern of criminal conduct. *See State v. Darrisaw, 660 So.* 2d 269 (Fla. 1995).

We affirm the addition of thirty points for a prior serious felony to appellant's scoresheet because appellant failed to preserve this issue for appellate review. *Hyden v. State, 7 15 So,* 2d 960 (Fla. 4th DCA *1998); Tanner v. State, 724 So.* 2d 643 (Fla. 1st DCA 1999).

AFFIRMED.

WARNER, C.J., KLEIN and TAYLOR, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

RICKY HOPE, Appellant, vs. STATE OF FLORIDA, Appellee.	)	Case No. 98-02093

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
17th Judicial Circuit of Florida,
In and For Broward County (Criminal Division)

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

IAN SELDIN
Assistant Public Defender
Attorney for Ricky Hope
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 3340 1
(561) 355-7600
Florida Bar No. 604038

CERTIFICATE OF INTERESTED PARTIES

Counsel for defendant/appellant certifies that the following persons and entities have or may have an interest in the outcome of this case:

Robert Brown
(complaining witness)

Robert Butter-worth, Attorney General
Office of Attorney General, State of Florida
(appellate counsel for prosecution/appellee)

Honorable Robert B. Carney
Circuit Court Judge, Seventeenth Judicial Circuit
(trial judge)

Ricky Hope
(defendant/appellant)

Richard L. Jorandby, Public Defender
Office of Public Defender, Fifteenth Judicial Circuit
Ian Seldin, Assistant Public Defender
(appellate counsel for defendant/appellant)

Chris Narducci, Esquire
(trial counsel for defendant/appellant)

Michael J. Satz, State Attorney
Office of State Attorney, Seventeenth Judicial Circuit
David Frankel, Assistant State Attorney
(trial counsel for prosecution/appellee)

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote the record on appeal, which consists of the relevant documents filed below.

The symbol "T" will denote the transcript.

The symbol "SR" will denote the Supplemental Record on Appeal.

The symbol "ST" will denote the Supplemental Transcript on Appeal.

STATEMENT OF THE CASE AND FACTS

Back on July 24, 1996, Robert Brown was driving his friend's Green, 1996 Mitsubishi Mirage automobile. T. 168-9. While driving this car in the early morning, Brown parked it in the parking lot of a convenience store, so his passenger, Richardo, could enter the store to make a purchase. T. 169- 170. While waiting for his passenger's return, Brown listened to the radio. T. 171. The next thing which Brown remembered was being in the hospital, having been shot in the head. T. 171, 178. While Brown survived the wound, seventy to eighty percent of those who receive the same type of injury die. T. 178. Brown did not see anyone shoot him and had no altercation with any other person before being shot. T. 17 1.

Wade Everhart, a hotdog vender, was purchasing liquid propane gas when he saw a man exit the bed of a black pickup truck and approach a green car in the parking lot of a convenience store. T. 214-6, 219. The man then fired at least eight (8) rounds of gunfire into the green car. T. 217, 219-220. After the shooting, Everhart saw the man reenter the bed of the black pickup truck. T. 2 16-7.

Willie Mays Roberts,, owned a beauty salon located across from the convenience store. T. 269-271. When she heard the sound of gunshots, she exited her salon and saw Appellant, Ricky Hope, walking around the rear of a car, parked at the convenience store, with an unknown object in his hand. T. 270, 273-4. The windows of the car were damaged. T. 272. She then saw Appellantjump into the rear of a pickup truck and lay down on the floor of the bed. T. 272-3.

A friend of Robert Brown's, Charlie Christian, had heard that Brown had been shot, although he had not witnessed the shooting. T. 256, 263-4. Sometime after the shooting,

Christian encountered Appellant and asked him (Appellant) why he (Appellant) had shot Brown. T. 257, Accordingto Christian, Appellant replied by saying that he shot Brown because Brown was "running his mouth" over at the housing projects. T. 257-8.

Appellant was charged by way of an information, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. R. 1-2. The sole charge against him was attempted first degree murder with a firearm. R. 1-2.

At the trial's conclusion, the jury found Appellant guilty as charged of attempted first degree murder with a firearm. T. 355; R. 25. The trial court adjudicated him guilty and passed the case for a sentencing hearing. T. 357; R. 44-5.

At the sentencing hearing, it was determined that Appellant scored a total of 162 (one hundred sixty-two) sentencing guidelines points. R. 32-3. This total was arrived at by factoring his current conviction for attempted first degree murder, a prior adult convictions for carrying a concealed weapon and grand theft and a prior juvenile delinquency adjudication for robbery with a deadly weapon. R. 32. An additional 40 (forty) points were assessed for severe victim injury, as well as 30 (thirty) points for "prior serious felony." R. 32-33. Based on his sentencing point total, Appellant's guidelines range was between 100.5 (one hundred point five) months and 167.5 (one hundred sixty-seven point five) months imprisonment, with a recommended term of incarceration of 134 (one hundred thirty-four) months, R. 33.

The trial court imposed a sentenced of thirty (30) years imprisonment against Appellant. R. 35-7; ST. 28-9. In so doing, the trial court, both orally and in writing, cited its reasons for aggravating Appellant's sentence as follows: (1) Appellant had an excessive nonscorable

juvenile record; (2) the primary offense upon which Appellant was sentenced was a crime bearing a sentencing level of seven (7) or higher and he had previously been convicted of offenses of a level eight (8) or higher, specifically a juvenile adjudication for armed robbery; and (3) Appellant was not amenable to rehabilitationas evinced by an escalating pattern of criminal activity, specifically a pattern of violent criminal conduct beginning in 199 1 with a strong armed robbery, then to an armed robbery and then the current offense of attempted first degree murder. ST. 26-8; R. 28.

In support of the trial court's reasons for imposing an upward guidelines departure sentence was the results of Appellant's pre-sentence investigation ("PSI"). SR. The PSI reflects that Appellant had a history with the juvenile court system ranging as far back as August, 1991. SR. Of the 19 (nineteen) allegations of juvenile criminal conduct made against Appellant, 7 (seven) resulted in final, judicial dispositionswhere a delinquency determinationwas made. SR. Of these 7, 4 (four), burglary in 1992 and 1993, grand theft auto in 1993 and robbery with a deadly weapon in 1993, were for felony-type crimes, while the other 3, two petit larceny and one trespass, were for misdemeanor-type offenses. SR. The remainder consisted of juvenile cases that were either resolved non-judicially, held open without any disposition or nolle prosed. SR. One of the charges the trial court used to premise its third ground for departure, the 199 1 strong-arm robbery, was resolved non-judicially, while the 1992 armed robbery was "Held open" with no record of any sort of disposition. SR; R. 28; ST, 26-8.

Upon the trial court's findings and imposition of the upward guidelines departure sentence, Appellant interposed an oral, contemporaneous objection, citing that his prior record did not qualify for a departure sentence under the stated grounds. ST. 29.

Appellant timely filed his Notice of Appeal. R. 41.

SUMMARY OF THE ARGUMENT

Point I:

The trial court erred in imposing an upward departure sentence. All three grounds it articulated, both orally and in writing, are invalid, based on the supporting facts, to aggravate Appellant's sentence to the statutory maximum of 30 years imprisonment. Due to the fact Appellant's prior level 8 or higher offense was a juvenile delinquency adjudication, the trial court improperly departed on the that basis. The ground that Appellant had an escalating pattern of criminal activity, evinced by a progression of increasingly violent crimes, was inadequately supported by a single, prior violent juvenile delinquency adjudication for robbery with a deadly weapon, since all other prior violent juvenile charges were not equivalent to adult convictions. Finally, the trial court over-utilized Appellant nonscorable juvenile record to depart beyond that which Appellant would score on the guidelines had those prior juvenile charges, which resulted in dispositions equivalent to adult findings of guilt, been scored.

Point II:

Appellant's guidelines scoresheet is fundamentally erroneous. The inclusion of 30 points for "prior serious felony" was inapplicable to Appellant, since his crime was committed in July, 1996 and the effective date for the imposition of this rule was October, 1996.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN IMPOSING AN UPWARD DEPARTURE SENTENCE, IN THAT IT FACTUAL SUPPORT FOR ALL THREE OF ITS STATED GROUNDS FOR DEPARTURE ARE LEGALLY INVALID, BASED ON THE RECORD ON APPEAL.

The trial court's second ground for aggravating Appellant's sentence was that his current offense, attempted first degree murder, carried a sentencing level score of no less than 7, while he had a prior juvenile adjudication for armed robbery with a deadly weapon, which carried a sentencing level score of no less than 8 (R. 28; ST. 26-8). Section 921.0012, Fla. Stat. (1996); $921.00 16(3)(r), Fla. Stat. (1996). This Court, in Wilson v. State, 696 So. 2d 528 (Fla. 4th DCA 1997) held that a juvenile adjudication "cannot constitute a prior 'level 8 or higher' conviction under section 921.0016(3)(r). Id. at 529. This Court went on to explain that:

> As a general matter of Florida law, an adjudication of delinquency may not be deemed a "conviction." For this reason, juvenile adjudications are not considered prior "convictions" in classifying a defendant as an habitual offender. Similarly, a prior juvenile adjudication for a violent felony may not serve as an aggravating circumstance under the death penalty statute because it is not a "conviction" as required by the statutory language. Likewise, we hold that a juvenile adjudication may not serve as a prior "level 8 or higher" "conviction" under section 92 1 .OO 16(3)(r).

Id. [citations omitted].

In the instant case, therefore, the trial court erred in aggravating Appellant's sentence and imposing a guidelines departure to thirty (30) years imprisonment based on the provisions of

§921.0016(3)(r). Hence, this Court should strike as invalid this second ground for aggravating Appellant's sentence.

The trial court's third ground justifying departure is likewise invalid. The trial court found that Appellant had engaged in an escalating pattern of criminal conduct, in that he had "engaged in violent felony offenses beginning with simple robbery and leading to the instant offense of Attempted First Degree Murder" (R. 28; ST. 27). Section 92 1 .OO 1(8), Fla. Stat. (1996). In State v. Darrisaw, 660 So. 2d 269 (Fla. 1995), the Florida Supreme Court held that §92 1 .00 1(8) provides for an upward guidelines departure sentence where the facts indicate, "'an escalating pattern of criminal conduct.'" Id. at 270. The court explained one way to demonstrate an escalating pattern was to show a progression of increasingly violent crimes. Id. at 27 1. Based -on the trial court's written and oral reasons for departure, it elected to aggravate Appellant's sentence based exclusively on finding that an escalating pattern existed, evinced by Appellant's progression of increasingly violent crimes (R. 28; ST. 27).

Although a prior juvenile record may be used to show an escalating pattern of criminal activity, see Taylor v. State, 659 So. 2d 1202 (Fla. 3d DCA 1995), based on Appellant's PSI (SR) the trial court's reason for the escalating violence aggravator was invalid. Its invalidity is due to the fact that two of the three juvenile robbery charges are not equivalent to adult convictions. In Williams v. State, 691 So. 2d 1158 (Fla. 4th DCA 1997), this Court held that an escalating pattern of crime departure must be " rooted in convictions or juvenile dispositions. Hence, mere 'contacts' with the juvenile system will not support a finding of an escalating pattern of criminal conduct." Id. at 1159. According to the PSI, which the trial court utilized

as its basis to impose the guidelines departure sentence (ST. 26), Appellant's 1991 "simple robbery" charge did not result in a disposition which was the equivalent of an adult conviction. Puffinberger v. State, 581 So. 2d 897, 898 (Fla. 1991); see also Burke v. State, 483 So. 2d 404 (Fla. 1985). Rather, the PSI reflects a disposition entitled "non-judicial," which is neither a delinquency adjudication nor a withhold of delinquency adjudication, and fails to demonstrate any finding of guilt (SR). Williams v. State, supra at 1159; Taylor v. State, supra. Additionally, the 1992 armed robbery charge reflected a "held open" disposition, or in other words, no disposition at all (SR). A prior charge which fails to reflect any final disposition cannot be used as a basis to aggravate a sentence. Williams v. State, supra; see also Abouraad v. State, 677 So. 2d 13 19, 1321 (Fla. 4th DCA 1996).

The only robbery charge resulting in an judicial disposition and ostensibly a finding of guilt was Appellant's 1993 juvenile delinquency adjudication for robbery with a deadly weapon, which resulted in a commitment to the Eckerd Youth Development Center (SR). Hence, the factual support for the trial court's progression of increasingly violent crimes ground for departure is a single delinquency adjudication for robbery with a deadly weapon. However, as this Court ruled in Williams, supra, a pattern of criminal activity cannot be establish with but a single, prior offense. Id. at 1160. Notwithstanding the fact that both robbery with a deadly weapon and attempted first degree murder are both level 9 felony offenses, §92 1 .00 12, Fla. Stat., thus not, per se, escalating in severity or violence, the two crimes fail, in and of themselves, to show a pattern justifying the trial court's specific ground to aggravate Appellant's sentence.

Consequently, this ground for guidelines departure is invalid and the trial court erred in relying upon it in sentencing Appellant to 30 years imprisonment.

The trial court's first ground for departure, Appellant's nonscorable juvenile adjudications, while a proper ground to upwardly depart from the presumptive sentencing guidelines range, Puffinberger v. State, supra, was erroneous construed by the trial court, resulting in an invalid aggravatedsentence. In Puffinberger, the Florida Supreme Court held that nonscorable juvenile record could be considered as a reason for a guidelines sentence departure, but "only to the extent it contains dispositions that are the equivalent of adult convictions and only if the record is significant and the resulting departure is no greater than which the defendant would have received if the record had been scored." Id. at 898-900. The trial court significantly deviated from the holding in Puffinberger on two accounts. First, it considered Appellant's entire juvenile record, irrespective of whether any of the charges were in fact equivalent to adult convictions (ST, 26). Second, the trial court imposed a departure sentence to the statutory maximum of thirty years imprisonment, instead of limiting the departure to what Appellant would have received had his available and nonscorable juvenile record been scored. See also Harris v. State, 685 So. 2d 1282, 1284 (Fla. 1996); Miller v. State, 669 So. 2d 1118, 1119 (Fla. 4th DCA 1996).

Based on the PSI and the guidelines scoresheet utilized by the trial court in sentencing Appellant, Appellant's prior record point total was 24 (twenty-four). This sum consisted of 23 (twenty-three)points for the prior juvenile adjudication for robbery with a deadly weapon, 0.2 (zero point two) points for the prior adult conviction for carrying a concealed weapon and 0.8

(zero point eight) points for his prior adult conviction for grand theft. Pursuant to the supreme court's holding in Puffinberger and Harris, Appellant's prior record score could be enhanced with the following juvenile delinquency findings: (1) A 1992 burglary, where Appellant was placed on juvenile community control; (2) a 1992 grand theft auto, where Appellant was placed on juvenile community control; (3) and (4) two 1992 juvenile adjudications for petit larceny, for both of which Appellant was placed on community control; (5) a 1992 delinquency adjudication for burglary, where Appellant was again placed on community control; and (6) a delinquency adjudication in 1993 for trespassing. Of these six nonscorable juvenile offenses, three are misdemeanors, totaling 0.6 prior record, sentencing points, two are for burglaries, one of a structure and the other undefined, both level 4 offenses, totally 4.8 (four point eight) sentencing points and one for grand theft of a motor vehicle, a level 4 crime, totaling 2.4 (two point four) sentencing points.

All other facets of his prior juvenile record are not subject to scoring, because either the charges did not result in judicial sanctions or no dispositions resulted. Puffinberger v. State, supra; Burke v. State, supra; Williams v. State, supra. Hence, the extent to which Appellant's sentence may be aggravated, due to his prior nonscorable juvenile record is a total of 7.8 (seven point eight) sentencing points, Inasmuch as an additional 7.8 points would not enlarge Appellant's sentencing point total to an amount which would qualify him for 30 years imprisonment, the trial court's imposition of such a sentence, based on Appellant's nonscorable juvenile record, was erroneous.

The trial court erred in imposing a 30 year, aggravated sentence against Appellant based on three invalid grounds for upward departure. Consequently, this Court should vacate Appellant's current sentence and remand this cause with directions to impose a sentence pursuant to the sentencing guidelines. Shull v. Dugger, 5 15 So. 2d 748,749 (Fla. 1987); Suggs v. State, 688 So. 2d 943, 944 (Fla. 1st DCA 1997), and not to again impose any guidelines departure, except that which is authorized under Puffinberger, Supra; Cleveland v. State, 673 So. 2d 983, 984-5 (Fla. 4th DCA 1996); Wyche v. State, 576 So. 2d 884 (Fla. 1st DCA 1991).

ARGUMENT

POINT II

APPELLANT'S SENTENCING GUIDELINES SCORESHEET IS FUNDAMENTALLY ERRONEOUS, IN THAT IT ASSESSES 30 "PRIOR SERIOUS FELONY" POINTS FOR A CRIME COMMITTED PRIOR TO THE EFFECTIVE DATE THAT SUCH POINTS WERE AUTHORIZED TO BE ASSESSED.

Florida Rules of Criminal Procedure 3.703(d)(12) provides that:

> A single assessment of thirty prior serious felony points is added if the offender has a primary offense or any additional offense ranked in the level 8, 9, or 10 and one or more prior serious felonies. A "prior serious felony" is an offense in the offender's prior record ranked in level 8, 9 or 10 and for which the offender is serving a sentence of confinement, supervision or other sanctions or for which the offender's date of release from confinement, supervision or other sanction, whichever is later is within 3 years before the date the primary offense or any additional offenses were committed. Out of state convictions wherein the analogous or parallel Florida offenses are located in offense severity level 8, 9, or 10 are to be considered prior serious felonies.

Notwithstandingthe arguments advanced in Point I of Appellant Initial Brief, supra, that his juvenile adjudication for robbery with a deadly weapon is not tantamount to an adult criminal conviction, which the plain language of this rule would otherwise require, see Wilson v. State, supra, this rule was mandated to apply to offenses committed on or after October 1, 1996. Fla. R. Crim. P. 3.703(d)(12)(committee notes re 1996 amendments). According to the trial testimony (T. 2 14) and the charging document (R. 1-2), Appellant committed the attempted first degree murder on July 24, 1996.

Although Appellant failed to object to the addition of the 30 prior serious felony points, their inclusion in his guidelines sentencing score was fundamental error, as it would otherwise result in the imposition of an illegal sentence. An illegal sentence includes any sentence that "patently fails to comport with statutory or constitutional limitations." State v. Mancino, 714 So. 2d 429,433 (Fla. 1998); see also Gavton v. State, Case no. 97-3672 (Fla. 1 st DCA December 2 1, 1998). The addition of the 30 prior serious felony enhancement points, pursuant to a rule of court not in effect on July 24, 1996, to Appellant's sentencing point total was tantamount to imposing a punishment for a nonexistent crime, which is a fundamental error. See Hebb v. State, 714 So. 2d 639, 640 (Fla. 4th DCA 1998); see Williamson v. State, 510 So. 2d 355, 357 (Fla. 4th DCA 1987).

In the event this Court agrees with Appellant and finds that the trial court's grounds for departure were all invalid, Appellant will be entitled to a guidelines sentence. Shull v. Dugger, supra; Wyche v. State, supra. Consequently, this Court, in vacating Appellant's improper departure sentence, should instruct the tiial court that any guidelines sentence it deems to impose cannot include 30 points for "prior serious felony."

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Appellant respectfully requests this Court to reverse the judgment and sentence of the trial court and to remand this cause with proper directions.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

IAN SELDIN
Assistant Public Defender
Attorney for Ricky Hope
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Florida Bar No. 604038

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereofhas been furnished by courier to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 3340 1-2299 this 30th day of December, 1998.

IAN SELDIN
Counsel for Appellant