IN THE SUPREME COURT OF FLORIDA,

RICKY HOPE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC96352
4th DCA Case No. 98-2093

****

RESPONDENTS' BRIEF ON THE MERITS

****

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

DAVID M. SCHULTZ
Assistant Attorney General
Florida Bar No. 0874523
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
(561) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number

STATE CASES

STATE STATUTES

RULES OF PROCEDURE

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's Statement of the Case and Facts to the extent that it represents an accurate non-argumentative recitation of the procedural history and facts of this case.

SUMMARY OF ARGUMENT

Appellant failed to preserve for appellate review the assessment of the thirty scoresheet points for a prior serious felony. Although the enabling legislation of this assessment, chapter 95-184, Laws of Florida, was found to be unconstitutional, the trial court could have imposed the same departure sentence under the 1994 guidelines. Furthermore, although appellant falls within the *Maddox* window, he is not entitled to relief, because 1) the error is not apparent on the face of the record, and 2) it is apparent from the record that the alleged error would have had no quantitative effect on appellant's sentence.

A trial court can find an escalating pattern of criminal conduct by comparing the instant offense with a prior record of only one conviction. Nonetheless, appellant's other prior armed robbery did reflect that there was a disposition. Appellant has not demonstrated that there was no adjudication by merely referring to the words "held open" which are typed next to the disposition date. The record also reflects a progression of increasingly violent crimes, because it shows that appellant went from threatening a victim with a knife to shooting a victim in the head with a gun.

ARGUMENT

POINT I

THE ASSESSMENT OF THE THIRTY POINTS FOR PRIOR SERIOUS FELONY WAS NOT PRESERVED FOR APPELLATE REVIEW AND DOES NOT AMOUNT TO FUNDAMENTAL ERROR.

Petitioner was given a thirty-year upward departure sentence (R 28, 33, 35). Petitioner now generally argues that the thirty sentencing points added to his scoresheet for a prior serious felony was fundamental error. Below, petitioner argued in his initial brief that this assessment was to be made to offenses committed on or after October 1, 1996.[1] However, this assessment was in fact to be made to offenses committed on or after October 1, 1995. § 921.0014, Fla. Stat. (1995); Ch. 95-184, § 6, at 1693, 1696, Laws of Fla. Since the instant offense took place on July 24, 1996, these points were properly added to the scoresheet.

---

[1]The state argued that appellant failed to preserve this issue for appellate review and that such a scoresheet error did not amount to fundamental error, citing to *Tanner v. State*, 24 Fla. L. Weekly D165 (Fla. 1st DCA Jan 8, 1999). The state further argued that the thirty points were properly assessed because they were applicable to offenses occurring on or after October 1, 1995.

However, since this assessment was created by chapter 95-184, which was found by this Court to be unconstitutional as violative of the single subject rule contained in article III, section 6 of the Florida Constitution, and since petitioner has standing to challenge his sentence on this basis,[2] the issue becomes whether

appellant's sentence under the 1995 guidelines could have been imposed under the 1994 guidelines. ***Heggs v. State***, 25 Fla. L. Weekly S359 (Fla. May 4, 2000), citing ***Freeman v. State***, 616 So. 2d 155, 156 (Fla. 1st DCA 1993). In other words, appellant is entitled to relief under ***Heggs*** only if the departure sentence he was given was not a sentence that the trial court could, as a matter of law, have imposed. ***Id***. Appellant failed to allege that he could not have been given a thirty-year departure sentence without the amendments effected by Ch. 95-184, because this sentence could have in fact been imposed under the 1994 guidelines. §§ 921.0016, 782.04, 777.04, 775.087 & 775.082, Fla. Stat. (1993). Therefore, appellant cannot obtain relief under ***Heggs***.

Petitioner also argues that the Fourth District Court of

---

[2]The instant offense took place on July 24, 1996, and the window period for challenging guidelines provisions impacted by chapter 95-185 is October 1, 1995, to May 24, 1997. ***Trapp v. State***, 25 Fla. L. Weekly S429 (Fla. June 1, 2000).

Appeal was in error to find that this issue was not preserved on the basis of *Hyden v. State*, 715 So. 2d 960 (Fla. 4th DCA 1998), because of this Court's decision in *Maddox v. State*, 25 Fla. L. Weekly S367 (Fla. May 11, 2000).[3] In *Maddox*, this Court held that unpreserved sentencing errors effecting those with standing could be raised on direct appeal so long as the error amounted to a fundamental sentencing error.[4] An error is fundamental if 1) it is apparent from the face of the record, and 2) it is serious. *Id*.

First, it is not apparent on the face of the record that the inclusion of the thirty points was in error. Petitioner's argument below was that these thirty points were to only be assessed for offenses committed on or after October 1, 1996; however, Ch. 95-184, Laws of Florida makes it perfectly clear that it applies to offenses that are committed on or after October 1, 1995. Further,

Ch. 95-184 was found to be unconstitutional and the 1995

---

[3]Petitioner's appeal also falls within the *Maddox* window of July 1, 1996 and December 12, 1999.

[4]In *Maddox*, this Court also acknowledged that absent relief under its opinion or the recent amendments to Fla. R. Crim. P. 3.800, that Fla. R. App. P. 9.140(d) requires that sentencing errors be preserved, either through a contemporaneous objection or the filing of a motion pursuant to Fla. R. Crim. P. 3.800(b).

sentencing scoresheet used in this matter therefore became a nullity. Since these thirty points first became part of the guidelines sentencing scheme under 95-184, they become a non-issue, so long as the sentenced imposed was a legal sentence under the 1994 guidelines, which, as was already discussed, it was.

In regard to the second prong under *Maddox* and in regard to departure sentences, it is a serious error when the trial court fails to file statutorily required written reasons for the departure. *Id*. In this matter, the trial court did file written reasons for the departure. Nothing in the *Maddox* opinion suggests that a scoresheet error is fundamental when a departure sentence is entered. In fact, in *Maddox* this Court noted that a scoresheet error is serious only when the error was likely to cause a quantitative effect on the defendant's sentence. *Id*. Certainly, a review of the record reveals that even if the thirty points were erroneously assessed, the trial court would have certainly still imposed a thirty-year departure sentence. The undersigned encourages this Court to read the transcript of the sentencing hearing in its entirety, because it is apparent from its content that the trial court was aghast at the number of appellant's prior juvenile referrals including robberies and armed robberies at the ages of eleven, twelve and

thirteen. The trial court made it perfectly clear that he intended to "throw the book" at petitioner (Page 14, Lines 24-5) and take petitioner off the street for as long as possible (Page 16, Lines 10-15). The trial court indicated that he saw no other alternative (Page 17, Lines 12-13). The trial court also indicated that he was frustrated with the juvenile justice system (Page 15, Lines 20-25) and thought that petitioner should have been sentenced to life on his second armed robbery about five years ago (Page 20, Lines 2-5). Clearly, the mere elimination of the thirty points for prior serious felony would have had no quantitative effect on petitioner's sentence.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING A DEPARTURE SENTENCE ON THE GROUND THAT PETITIONER IS NOT AMENABLE TO REHABILITATION OR SUPERVISION AS EVIDENCED BY AN ESCALATING PATTERN OF CRIMINAL CONDUCT.

Jurisdiction in this matter was based on a conflict relating solely to Point I. The state acknowledges that under *Savoi v.*

State, 422 So. 2d 308, 310 (Fla. 1982), this Court has discretionary authority to consider other issues than those upon which jurisdiction is based. However, this Court should decline to address this issue, because it is beyond the scope of the conflict. *See State v. Gibson*, 585 So. 2d 285 (Fla. 1991).

Be that as it may, the trial court's reasons for imposing an upward departure sentence included:

> "The Defendant is not amenable to rehabilitation or supervision as evidenced by an escalating pattern of criminal conduct as described in F.S. 921.001(8).[5] The Court Finds the Defendant to have engaged in violent felony offenses beginning with simple robbery escalating to armed robbery and leading to the instant offense of Attempted first Degree Murder" (R 28).

Fla. Stat. § 921.001(8) authorizes a departure sentence when the trial court finds, by a preponderance of the evidence, that the defendant's prior record, including offenses for which adjudication was withheld and the current criminal offense for which the defendant is being sentenced, indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent to violent crimes, a progression of increasingly violent crimes, or a pattern of increasingly serious criminal activity. *Id*. The

---

[5]§ 921.0016(3)(p) actually defines the aggravating circumstance, while § 921.001(8) defines an escalating pattern of criminal conduct.

trial court found that appellant engaged in violent felony offenses beginning with simple robbery escalating to armed robbery and leading to the instant offense of attempted first degree murder (R 28).

Petitioner admits that his presentence investigation report reflects a 1993 juvenile adjudication for robbery with a deadly weapon but argues that this prior offense is alone insufficient to establish an escalating pattern of criminal conduct, citing to *Williams v. State*, 691 So. 2d 1158 (Fla. 4th DCA 1997). However, the plain language of the statute indicates that the escalating pattern is to be discerned from a defendant's prior record and his or her current criminal offense for which he or she is being sentenced. Nothing in the statue indicates that the prior record must include more than one conviction. Moreover, in *Barfield v. State*, 594 So. 2d 259 (Fla. 1992), this Court approved the decision of the Fourth District Court of Appeal holding that there was an escalating pattern of criminal conduct where the defendant only had one prior conviction.

Petitioner also argues that when comparing these two convictions there is neither an increase in the violence nor the severity, because both robbery with a deadly weapon and attempted first degree murder are both first degree, level 9 felony offenses. However, in the 1993 robbery with a deadly

weapon, petitioner threatened the clerk with a knife (SR, PSI). In the instant offense, appellant shot the victim in the head with a gun. *Id*. The use of the firearm in the instant offense is sufficient evidence to demonstrate increased violence. *Moore v. State*, 634 So. 2d 214 (Fla. 4th DCA 1994). *See also Taylor v. State*, 659 So. 2d 1202 (Fla. 3d DCA 1995).

Finally, petitioner argues that the 1992 armed robbery was not a juvenile disposition, because the words "Held open" are typed beside the disposition date of July 27, 1992. Petitioner never challenged this disposition during sentencing, but on appeal raised this issue knowing full well that since the state was not obligated to corroborate the disposition below that there would be nothing in the record to clarify the meaning of the words "Held open." As the state argued below, on appeal the burden is on petitioner to demonstrate prejudicial error. Fla. Stat. § 924.051(7); *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1980). The presentence investigation report does indicate that there was a disposition of this referral, because it reflects a disposition date. Petitioner has not demonstrated that there was no disposition by merely pointing to the words "Held open." Therefore, petitioner has not demonstrated that the trial court would have abused its discretion by considering this disposition when finding that

petitioner's prior record and the current criminal offense for which he was sentenced indicate an escalating pattern of criminal conduct.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, respondents respectfully request that this Honorable Court **AFFIRM** the opinion of the Fourth District Court of Appeal. Respectfully submitted,

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

_____
DAVID M. SCHULTZ
Assistant Attorney General
Florida Bar No. 0874523
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
(561) 688-7759

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief has been prepared in Courier

New font, 12 point, and double spaced.

_____
DAVID M. SCHULTZ
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by courier to Ian Seldin, Esq., Office of the Public Defender 421 Third Street, 6th Floor, West Palm Beach, Florida this ____ day of _____, 2000.

_____
DAVID M. SCHULTZ
Of Counsel