

IN THE SUPREME COURT OF FLORIDA

RICKY HOPE, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO. SC96352  
 ) Lower Tribunal No. 4D98-2093  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

PETITIONER'S REPLY BRIEF ON THE MERITS

On review from the Circuit Court  
of the Seventeenth Judicial Circuit,  
In and For Broward County, Florida  
[Criminal Division].

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POINT I

ISSUE PRESENTED:

THE ADDITION OF 30 SENTENCING POINTS ON PETITIONER'S GUIDELINES SCORESHEET FOR A PRIOR SERIOUS FELONY WAS FUNDAMENTAL ERROR WHICH MAY BE REVIEWED ON APPEAL, NOTWITHSTANDING THE LACK OF A CONTEMPORANEOUS OBJECTION. . . . . 5

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ISSUE PRESENTED:

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**PRELIMINARY STATEMENT**

Petitioner was the defendant and Respondent 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 Court.

The symbol "R" will denote the Record on Appeal, "T" the transcript.

The symbol "PB" will denote the Petitioner's Brief on the Merits.

The symbol "RB" will denote the Respondent's Brief on the Merits

**CERTIFICATION OF FONT**

Counsel for petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

**STATEMENT OF THE CASE AND FACTS**

Petitioner acknowledges Respondent's acceptance of his Statement of the Case and Facts advanced in the Brief on the Merits. PB. 2-5; RB. 1.

**SUMMARY OF THE ARGUMENT**

**Point I:**

The error in assessing 30 sentencing points for "prior serious felony" on Petitioner's guidelines scoresheet is subject to appellate review. Although Petitioner failed to interpose a contemporaneous objection to this point assessment, such was fundamental error. The fundamental nature of this guidelines scoresheet error is two-fold. It is a serious, patent error, inasmuch as it is apparent on the face of the record on appeal and its qualitative effect on the sentencing process and a quantitative effect of Petitioner's sentence. Moreover, the error rose to the level of a violation of Petitioner's right to due process of law, since the 30 point assessment was a result of the utilization of the 1995 sentencing guidelines. The use of the 1995 sentencing guidelines is prohibited for felony offenses committed between October 1, 1995 and May 24, 1997. Petitioner's crime was committed on July 24, 1996, well within the window period that this Court has held that the 1995 are inapplicable.

**Point II:**

The sentence imposed by the trial court upon Petitioner, 30 years imprisonment, was an invalid guidelines departure. The sole ground found to be valid by the Fourth District Court of

Appeal, that the current offense evinced an escalating pattern of violent conduct, is not supported by the record on appeal. The record reflects that the trial court's reliance on various prior juvenile charges was inappropriate, as they did not reflect either an adjudication or final disposition at the time of sentencing. Additionally, the sole prior violent crime which could be relied upon was neither more serious nor violent than the offense upon which Petitioner was sentenced.

**ARGUMENT**

**POINT I**

**ISSUE PRESENTED:**

**THE ADDITION OF 30 SENTENCING POINTS ON PETITIONER'S GUIDELINES SCORESHEET FOR A PRIOR SERIOUS FELONY WAS FUNDAMENTAL ERROR WHICH MAY BE REVIEWED ON APPEAL, NOTWITHSTANDING THE LACK OF A CONTEMPORANEOUS OBJECTION.**

Respondent completely by-passes Mr. Hope's issue presented by insisting that the erroneous computation of Petitioner's scoresheet on an unlawful sentencing guidelines scheme had no quantitative effect on his sentence, because he would have received a 30 year, departure sentence, regardless, even pursuant to a corrected calculated 1994 sentencing guidelines scoresheet (RB. 4-6). This argument is both presumptuous and wrong.

As previously stated (PB. 13), although one of multiple grounds for a guidelines departure sentence may be held valid upon appellate review, where there are one or more invalid grounds, an error concerning the miscalculations of the sentencing guidelines scoresheet, utilized by a trial court to impose that departure sentence, cannot be deemed harmless. Smith v. State, 678 So. 2d 1374, 1376 (Fla. 4<sup>th</sup> DCA 1996). While there is no longer a rule of per se reversible error for guidelines scoresheet error, State v. Mackey, 719 So. 2d 284, 285 (Fla. 1998), when an erroneous scoresheet is used as a basis to impose a guidelines departure sentence, an appellate court must determine



whether the use of such a scoresheet adversely affected the sentence imposed by the trial court. State v. Rubin, 721 So. 2d 716 (Fla. 1998); Hines v. State, 587 So. 2d 620, 621 (Fla. 1991).

In the present case, as previously addressed, the guidelines scoresheet error is significant (PB. 8-13). In addition to other arguments advanced in Petitioner's Merits Brief (PB. 8-13), fundamental error occurred by virtue of the use of the 1995 version of the sentencing guidelines for an offense committed in July 1996. Heggs v. State, 25 Fla. L. Weekly S138 (Fla. February 17, 2000). This fundamental error affected both the quality as well as the quantity of Petitioner's sentence, since his sentencing range would have been substantially lower under the 1994 guidelines with the exclusion of the 30 points for prior serious felony offenses and significantly lower scoring of various prior felony convictions (PB. 12-3).

Respondent presumes that notwithstanding the improper use of the 1995 sentencing guidelines, a point which it all but conceded (RB. 3-4), the trial court would again impose a 30 year guidelines departure sentence. Although the trial court made various comments at the time it imposed Petitioner's sentence (RB. 6), these, in and of themselves, cannot be used as a basis to conclude that a departure sentence would again be imposed, under a properly calculated 1994 guidelines scoresheet. First, these remarks were made in light of a review of a miscalculated scoresheet, showing a presumptive median sentence which

was 30 months beyond that which would have been appropriate. Second, Petitioner is still challenging the one surviving departure ground ( see Point II, infra) and it is not entirely settled that the legal predicate for this departure sentence is at all proper. Finally, as addressed, above, at the very least this cause must be remanded back to the Fourth District Court of Appeal to make the determination whether the miscalculated, unlawful scoresheet had an affect on the trial court's decision to impose an upward departure sentence. State v. Rubin, supra; see Rubin v. State, 734 So. 2d 1089 (Fla. 3d DCA 1999).

**ARGUMENT**

**POINT II**

**ISSUE PRESENTED:**

**THE TRIAL COURT'S IMPOSITION OF AN UPWARD DEPARTURE SENTENCE ON THE GROUND OF AN ESCALATING PATTERN OF CRIMINAL CONDUCT WAS NOT JUSTIFIED.**

Mr. Hope has made a more than sufficient showing of prejudicial error on the issue of the trial court's improper upward guidelines departure sentence (PB. 14-7). However, Respondent's argument seeks to shirk its responsibility and its burden to prove a sufficient evidentiary basis for the imposition of an upward departure sentence. See Clark v. State, 443 So. 2d 973, 976 (Fla. 1983); see Cook v. State, 647 So. 2d 1066, 1067 (Fla. 3d DCA 1994).

The "disposition" entitled "Held Open," as to one of Petitioner's prior juvenile petitions alleging a violent felony offense, fails to provide any proof that there was any disposition in the first place. Respondent attempts to shift the burden on Mr. Hope to prove a lack of a disposition where the State, below, failed to make an initial showing that a disposition resulted from this prior juvenile delinquency petition. Respondent's proposition that a showing of a disposition date is synonymous with a delinquency adjudication has no merit (RB. 9-10). Once again, Respondent makes a groundless presumption from the record on appeal that, first, a disposition occurred and, second, the disposition resulted in a delinquency adjudication, as opposed to some

other result.

The State or the trial court carry the burden to make the record on appeal show that all requirements of due process have been met. Alexander v. State, 575 So. 2d 1370, 1371 (Fla. 4<sup>th</sup> DCA 1991). Moreover, the burden is on the State to present a record on appeal which affirmatively shows sufficiency of evidence to comport with the requirements of due process. Hayes v. State, 598 So. 2d 135, 137 (Fla. 5<sup>th</sup> DCA 1992). At Mr. Hope's sentencing hearing, the State failed to carry its burden to show that the "Held Open" juvenile delinquency petition was anything more than an obscure, meaningless reference, as stated in the pre-sentence investigation. To this end, it failed to carry its burden to assure the record on appeal complied with the requirement of due process. Hayes v. State, supra; Alexander v. State, supra. Respondent cannot now complain about the inadequate and insufficient showing and blame the shortcomings of the appellate record on Petitioner.

Respondent cites to Barfield v. State, 594 So. 2d 259 (Fla. 1992), for the proposition that one prior conviction, coupled with a present conviction, is sufficient to support a departure sentence based on an escalating pattern of criminal activity (RB. 8). However, this Court's Barfield decision was not concerned with an issue of an escalating pattern, but rather, a departure based on the commission of a subsequent crime in close temporal proximity to the defendant's release

from incarceration. These are two completely separate issue and this Court should not permit itself to be misled by Respondent's errant use of legal authorities. In point of fact, as previously argued (PB. 17), the Fourth District has held that a single prior conviction will not support a departure based upon an escalating pattern of criminal activity. Williams v. State, 691 So. 2d 1158, 1160 (Fla. 4<sup>th</sup> DCA 1997).

Additionally, Respondent cites to Moore v. State, 634 So. 2d 214 (Fla. 4<sup>th</sup> DCA 1994) and Taylor v. State, 659 So. 2d 1202 (Fla. 3d DCA 1995) for the proposition that the use of a firearm is a sufficient factor to approve an escalating pattern departure (RB. 9). However, neither of these authorities provide a sound basis for this Court to arrive at a similar conclusion. The ruling in the Moore decision was conclusory, devoid of any supporting or illuminating facts. Taylor is equally inapplicable. The decision's discussion concerning the use of firearm was constrained to the facts of the crime of which the defendant was convicted and did not extend to any of the prior convictions used as a predicate in support of the defendant's departure sentence.

Petitioner's attempted first degree murder conviction is neither escalating in severity nor violence from his prior juvenile adjudication for robbery with a deadly weapon. These two crimes cannot evidence a pattern and fail to justify the trial court's specific ground for upward departure. This Court

should disapprove of the Fourth District's opinion in the present case, Hope v. State, 736 So. 2d 1256 (Fla. 4<sup>th</sup> DCA 1999), and vacate the trial court's departure sentence and remand this Court with instructions to sentence Petitioner pursuant to the 1994 sentencing guidelines.

CONCLUSION

Based upon the foregoing Argument and cited authorities, Petitioner requests this Court disapprove of the decision of the Fourth District Court of Appeal and reverse the sentence of the trial court and remand this cause with such directive as may be deemed appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to David M. Schultz, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this \_\_\_\_\_ day of August, 2000.

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