IN THE SUPREME COURT OF FLORIDA

SIDNEY NORVIL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-746

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the appellate court below. This brief will refer to Petitioner as such, Defendant, or by proper name, e.g., "Norvil." Respondent, the State of Florida, was the prosecution in the trial court below and the appellee in the appellate court below. The brief will refer to Respondent as such, the prosecution, or the State. Reference to the record on appeal will be by the symbol "R" and, if the transcript volumes are numbered separately from the record volumes, then reference to the transcripts will be by the symbol "T;" reference to any supplemental record or transcripts will be by the symbols "SR" or "ST;" and reference to the Initial Brief of Appellant on the Merits will be by the symbol "IB;" all with the appropriate volume and page numbers. For example, page one of the third volume of the record would appear as (R3 1), page one of volume two of the first supplemental record would appear as (SR2 1), and page one of volume two of the third supplemental record would appear as (3SR2 1).

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts for purposes of this proceeding, insofar as it is not

slanted or argumentative, and subject to the following additions, corrections, and clarifications here and in the argument:

1. Prior to the sentencing hearing, the State had filed the State's Sentencing Recommendation. (R1 85) Among the things pointed out by the prosecutor was that Petitioner had been charged with burglary of a dwelling in 2005 (for an incident in which Petitioner and two others entered a garage and were going to take a Moped but were interrupted by the neighbor (R6 705)) and that he resolved the charges by pleading to the lesser of trespass. (R1 86) Only seven months later, Petitioner committed the instant offenses. (R1 86)
2. The judge was also well aware at sentencing that, while out on bond for the instant offenses, Petitioner committed another trespass, this time at the Boynton Beach Mall; this was elevated to a misdemeanor because of Petitioner's failure to appear which necessitated the issuance of a warrant. During the sentencing hearing, the judge inquired about the trespass at the mall and Petitioner's counsel confirmed that Petitioner had entered a plea on it; this was the same trespass mentioned at the bond hearing at which it was made clear that Petitioner had entered a plea to time served. (R6 635-38, 701)

3. The judge noted that Petitioner betrayed the trust of his neighbors across the street, saying "those people's lives are changed forever, forever. You're talking about people who had to move out of the house because of their terror about what had happened to them, that they got victimized because the defendant was the one that scoped their house on New Year's Day, brought his friends over, stole [sic] their house, trashed their house. He's convicted at trial of grand theft. He pleads to the burglary. First he's deserving of an adult sanction. … He's deserving of a sentence in the Department of Corrections." (R6 708-09)
4. At sentencing, Petitioner made it clear he was appealing to the court to let him out on probation. (R6 701-05) The State asked for an adult sentence of twenty years in prison. (R1 88) The judge sentenced Petitioner to twelve. (R6 709)
5. As the judge noted in his order denying the motion to withdraw the guilty plea, the motion could go only toward count I since Petitioner did not enter a guilty plea as to count II. (R2 150)

SUMMARY OF ARGUMENT

Petitioner asserts the trial court erred in sentencing when it considered a subsequent arrest. Contrary to Petitioner's

assertions, there was no such error. The Fourth District did not err in affirming the trial court. This Court must uphold the decision of the Fourth District.

ARGUMENT

ISSUE I: THE TRIAL COURT DID NOT ERR IN SENTENCING PETITIONER. (RESTATED).

Petitioner asserts that the trial court erred in sentencing Petitioner because the trial court considered the fact that Petitioner had been arrested subsequent to the crime in this case. Petitioner s argument is not well taken.

A. Jurisdiction.

Petitioner contended in his jurisdictional brief (JIB) that this Court had jurisdiction pursuant to Article V, §3(b)(3), of the Florida Constitution, which parallels Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). The Constitution, and the rule, provide: "The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The State would again submit that this Court should decline to accept jurisdiction for the reasons stated in the State's brief on jurisdiction. That is, there is no conflict between the decision in this case and in any of the cases cited by Petitioner in his initial brief on jurisdiction. (JIB) In the

case at bar, Norvil v. State, 39 Fla. L. Weekly D520, 2014 WL 940724, (Fla. 4th DCA 2014), the Fourth District explained that they were upholding consideration of the Petitioner's subsequent arrest and charges because of the following factors:

> (1) the new charge was relevant; (2) the allegations of criminal conduct were supported by evidence in the record; (3) the defendant had not been acquitted of the charge that arose from the subsequent arrest; (4) the record does not show that the trial court placed undue emphasis on the subsequent arrest and charge in imposing sentence; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests.

Norvil, 2014 WL 940724 at *5.

In his brief on jurisdiction, Petitioner relied on Yisrael v. State, 65 So. 3d 1177 (Fla. 1st DCA 2011), Mirutil v. State, 30 So. 3d 588 (Fla. 3d DCA 2010), and Gray v. State, 964 So. 2d 884 (Fla. 2d DCA 2007), as grounds for conflict jurisdiction. Significantly, Petitioner does not now bother to cite to Yisrael or Mirutil or Gray in his initial brief on the merits, therefore implicitly acknowledging that there was no conflict between those cases and the instant case, just as argued by the State in the State's brief on jurisdiction. The State again urges this Court to decline jurisdiction.

B. Preservation.

This issue appears to have been preserved since Petitioner's counsel objected to the judge's consideration of the pending charge in her sentencing memorandum (R1 110), and again at the

sentencing hearing (R6 705), and again in the supplement to the motion to vacate plea, judgments and sentences (R1 141)

C. The Standard of Appellate Review.

Insofar as Petitioner argued on appeal that the trial court erred in denying the motion to withdraw plea on the basis of this sentencing error, the standard of review is abuse of discretion. Allowing the withdrawal of a guilty plea is within the trial court's discretion; it is not a matter of right. Lopez v. State, 536 So. 2d 226, 229 (Fla. 1988), citing Adams v. State, 83 So. 2d 273 (Fla. 1955); Adler v. State, 382 So. 2d 1298 (Fla. 3rd DCA 1980). A trial court's decision regarding withdrawal of a plea will not be disturbed absent a showing of an abuse of discretion. Hunt v. State, 613 So. 2d 893, 896 (Fla. 1993); Adler v. State, 382 So. 2d 1298 (Fla. 3d DCA 1980); Booker v. State, 514 So. 2d 1079, 1085 (Fla. 1987)(defining "abuse of discretion" - discretion is abused only when no reasonable man could take the view adopted by the court); Peak v. State, 647 So. 2d 164 (Fla. 2d DCA 1994).

Moreover, where a motion to withdraw a plea occurs after sentencing, pursuant to Florida Rule of Criminal Procedure 3.170(l), the movant has the burden of proving in the trial court that a manifest injustice has occurred. Bemis v. State, App. 980 So. 2d 625 (Fla. 4th DCA 2008). This is a more stringent standard than a motion to withdraw a plea filed before

sentencing; the burden falls on the defendant to prove that withdrawal is necessary to correct the manifest injustice. Snodgrass v. State, 837 So. 2d 507, 508 (Fla. 4th DCA 2003). See Scott v. State, 629 So. 2d 888, 890 (Fla. 4th DCA 1993). That is, once the sentence has been imposed, a defendant must demonstrate a manifest injustice requiring correction before he or she will be allowed to withdraw the plea. State v. Partlow, 840 So. 2d 1040 (2003).

Insofar as Petitioner attacks the sentencing error in and of itself, Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)(d) provides that a defendant who pleads guilty or nolo contendere may directly appeal a sentencing error, if preserved. However, the decision as to what sanction a defendant should receive is a judgment call within the sound discretion of the trial court and will generally be sustained on review absent an abuse of discretion. Cf. Banks v. State, 732 So. 2d 1065, 1068 (Fla. 1999). "Generally, the trial court's imposition of a sentence that is within the minimum and maximum limits set by the legislature 'is a matter for the trial [c]ourt in the exercise of its discretion, which cannot be inquired into upon the appellate level.'" Nusspickel v. State, 966 So. 2d 441. 444 (Fla. 2d DCA 2007), quoting Shellman v. State, 222 So. 2d 789, 790 (Fla. 2d DCA 1969).

Although an appellate court generally may not review a sentence that is within statutory limits, an exception exists when the trial court considers constitutionally impermissible factors in imposing a sentence. Nawaz v. State, 28 So. 3d 122, 124 (Fla. 1st DCA 2010)(relying on national origin in sentencing defendant); Peters v. State, 128 So. 3d 832, 844 (Fla. 4th DCA 2013). Reliance on constitutionally impermissible factors is a violation of a defendant's due process rights. See Ritter v. State, 885 So. 2d 413, 414 (Fla. 1st DCA 2004); see also Holton v. State, 573 So. 2d 284, 292 (Fla. 1990). For example, Florida case law holds "that a trial judge may not rely upon conduct for which the defendant has been acquitted in imposing sentence and that to do so is a violation of the defendant's due process rights." Bucknor v. State, 965 So. 2d 1200, 1203 (Fla. 4th DCA 2007).

"A de novo standard of review applies to a claim that the trial court committed a sentencing error that rendered the sentence illegal." Norvil, 2014 WL 940724 at *2 (citations omitted). "The State has the burden to show from the record as a whole that the trial judge did not rely upon impermissible considerations in passing sentence upon the defendant where portions of the record reflect that the trial judge may have so relied." Epprecht v. State, 488 So. 2d 129, 130 (Fla. 3rd DCA 1986).

D. The Merits.

Petitioner pled guilty to burglary while armed with a weapon and to grand theft of a dwelling. (R6 675) The judge sentenced Petitioner to twelve years for the burglary and to five years for the grand theft. (R6 708)

Petitioner alleged on appeal that the trial court erred in considering during sentencing that Petitioner was arrested for a second burglary while Petitioner was out on bond for the instant charges. The Fourth District, sitting en banc, concluded below that there was no error. Norvil v. State, 39 Fla. L. Weekly D520, 2014 WL 940724 (Fla. 4th DCA 2014). The Fourth District was correct to do so.

The Fourth District issued the Norvil opinion en banc to clarify their earlier opinion in Seays v. State, 789 So. 2d 1209, 1210 (Fla. 4th DCA 2001). The Fourth District stated, "to the extent that Seays can be interpreted as prohibiting consideration of **subsequent arrests** in sentencing, we clarify that a sentencing court may properly consider **subsequent arrests and related charges**, if relevant, in determining an appropriate sentence." Norvil, 2014 WL 940724 at *5 (emphasis added).

The Fourth District explained that they were upholding consideration of the Petitioner's subsequent arrest and charges because of the following factors:

> (1) the new charge was relevant; (2) the allegations of criminal conduct were supported by evidence in the

> record; (3) the defendant had not been acquitted of the charge that arose from the subsequent arrest; (4) the record does not show that the trial court placed undue emphasis on the subsequent arrest and charge in imposing sentence; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests.

Id.

The Fourth District was correct to do so. As the appellate court explained in an earlier case:

> [w]hile the due process clause does prohibit a court from considering charges of which an accused **has been acquitted** when passing sentence, it does not preclude the court from considering all relevant factors when imposing a sentence authorized for the crime of which the defendant was convicted. The United States Supreme Court stated:
>
> > It is well established that a judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant, given the crime committed.
>
> Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). More recently, the Supreme Court recognized that it is permissible "for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment within the range prescribed by statute." Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2358, 147 L.Ed.2d 435 (2000).

Howard v. State, 820 So. 2d 337, 340 (Fla. 4th DCA 2002)(emphasis added). Also see Dowling v. State, 829 So. 2d 368, 371 (Fla. 4th DCA 2002)("[t]he United States Supreme Court has held that it is not a violation of a defendant's constitutional rights to consider other relevant factors when determining an appropriate sentence."), citing Roberts v. United States, 445 U.S. 552 (1980), and Williams v. New York, 337 U.S. 241 (1949).

During sentencing, a trial court may consider extraordinary or aggravating circumstances and the actions of the accused in the commission of the offense. See Whitfield v. State, 515 So. 2d 360 (Fla. 4th DCA 1987); Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984). Although the Criminal Punishment Code (CPC) does not score subsequent arrests on the scoresheet at sentencing, the Code directs that the penalty imposed should be "commensurate with the severity of the primary offense and **the circumstances surrounding the primary offense**." § 921.002(1)(c), Fla. Stat. (emphasis added).

In addition, at sentencing proceedings, "'evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant.'" Long v. State, 610 So. 2d 1268, 1274 (Fla. 1992) (capital case discussing holding that it was not error to allow the State to present evidence in the penalty proceeding regarding defendant's two prior rape convictions and quoting § 921.141(1), Fla.

Stat.). The facts surrounding a defendant's acts are relevant to the nature of the crime and the sentencing judge should not be forced to make his decision in a vacuum. See, e.g., Smith v. State, 699 So. 2d 629, 646 (Fla. 1997) (in sentencing phase of trial, evidence of uncharged sexual battery upon female victim that occurred during course of kidnapping prior to murder and was inseparable part of criminal episode was not unduly prejudicial and was relevant as evidence of heinous, atrocious, or cruel aggravating circumstance); Wike v. State, 698 So. 2d 817, 821 (Fla. 1997) (similar).

It is also worth noting that Florida law requires a sentencing judge, when faced with an offender like Petitioner, to order a pre-sentencing investigation (PSI) report to provide a "complete description of the situation surrounding the criminal activity with which the offender was charged... ." § 921.231(1)(a), Fla. Stat. Moreover, the law requires the judge to examine the information in the PSI and specifically consider the recommendations therein before imposing sentence. Fla. R. Crim. P. 3.710; Fla. R. Crim. P. 3.720. At bar, pursuant to the mandatory provisions of Florida Rule of Criminal Procedure 3.170 and at the request of the parties, the judge ordered a Pre-Sentence Investigation (PSI).

Jansson v. State, 399 So. 2d 1061 (Fla. 4th DCA 1981), is instructive. In that case, the court considered whether a judge

could permissibly consider a defendant's prior arrests in imposing sentence. The court concluded that it was permissible, instructively commenting on PSI reports in so concluding:

> We are further persuaded to this view by Section 921.231, Florida Statutes (1979), which prescribes the contents of a presentence investigation report in Florida. This report is, by definition, of a hearsay nature, and is to include a complete description of the circumstances surrounding the criminal activity in question. It is also to include a description of the offender's educational background, his employment background, his military record, his employment history, along with his social history, including the broadest consideration possible. In our opinion, if a court can consider a hearsay report of a defendant's social, educational, medical, psychiatric, and psychological history, it should also be able to consider the individual's arrest record so long as it is accurate and the opportunity to explain or otherwise rebut it is given.

Id., at 1064.

As an aside, the State would note that the presentence investigation report is not part of the record on appeal; to that extent, the State suggests that this issue is not ripe. Fla. R. App. P. 9.200(e); Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979);Altchiler v. State, 442 So. 2d 349, 350 (Fla. 1st DCA 1983). The presentence investigation report would serve to support the State's assertion that the trial court could properly consider Petitioner's arrest record.

Regardless, it is clear that, in Florida, a sentencing judge is required to take the totality of the circumstances into account, including evidence of the defendant's character and conduct and ability to comply with the law, especially conduct occurring while a defendant is out on bond or awaiting trial or sentencing. As the Fourth District recognized by citing Miller v. State, 709 N.E.2d 48, 49 (Ind.Ct.App.1999), subsequent arrests are proper considerations in sentencing because "[t]his information is relevant to the court's assessment of the defendant's character and the risk that he will commit another crime." Norvil, 2014 WL 940724 at *4. The new arrest was relevant to show a pattern of conduct and disrespect for the property of others and also reflected upon certain character flaws and traits that were not exhibited in his courtroom behavior. Norvil, 2014 WL 940724 at *5. In sum, Petitioner's inability to stay out of trouble while awaiting sentencing for the instant offense was highly relevant.

Thus, in Whitehead v. State, 21 So. 3d 157, 160 (Fla. 4th DCA 2009), the Fourth District held that the trial court was authorized to consider pending charges stemming from a prior arrest if they were relevant for sentencing purposes. And, in the instant case, the Fourth District held that the trial court was authorized to consider pending charges stemming from a subsequent attest if they were relevant for sentencing purposes.

Norvil, 2014 WL 940724 at *3. The court noted that "in both circumstances, the sentencing court will have to ensure the relevance and reliability of information presented regarding the alleged criminal activity and allow the defendant an opportunity to explain or rebut those charges." Norvil, 2014 WL 940724 at *3.

There is ample support elsewhere for the proposition that a sentencing court can consider pending charges at sentencing. As the Fourth District noted in the Norvil opinion:

> Federal courts and the majority of state courts have permitted a trial court to consider pending charges in imposing a sentence. See B.H. Glenn, Annotation, Court's Right, in Imposing Sentence, to Hear Evidence of, or to Consider, Other Offenses Committed by Defendant, 96 A.L.R.2d 768, § 2 (1964 & Supp.); Daniels v. Commonwealth, 2002-CA-001684-MR, 2003 WL 22519882, at *2 (Ky.Ct.App.2003) (providing an overview of decisions from other jurisdictions that have allowed courts to consider pending charges when sentencing a defendant). Many of those courts allowing pending charges to be considered at sentencing include charges that arose from subsequent arrests among their permissible sentencing factors. See, e.g., Houle v. United States, 493 F.2d 915, 915 (5th Cir.1974) (holding that the court could, in its discretion, consider the fact that the defendant was arrested while on bail awaiting trial in determining what sentence to impose, even though the arrest did not result in an indictment of the defendant); United States v. Cimino, 659 F.2d 535, 537-38 (5th Cir.1981) (holding that the sentencing judge could consider the defendant's subsequent arrest even though the charges were dismissed during sentencing); Miller v. State, 709 N.E.2d 48, 49 (Ind.Ct.App.1999) (explaining that subsequent arrests are proper considerations in sentencing because "[t]his information is relevant to the court's assessment of the defendant's character and the risk that he will commit another crime."); People v. Jones, 142 Ill.App.3d 51, 96 Ill.Dec. 469,

> 491 N.E.2d 515, 518–19 (1986) (holding that evidence of subsequent criminal conduct may be used at sentencing hearing on prior criminal charge and stating that "[m]isdeeds occurring up to the time of sentencing, whether before the finding of guilty or subsequent, are relevant as they go to the defendant's 'history and character.' ") (citing People v. Young, 138 Ill.App.3d 130, 92 Ill.Dec. 632, 485 N.E.2d 443, 446 (1985)); People v. Biggs, 89 Ill.App.2d 324, 231 N.E.2d 626, 628 (1967) (holding that the trial court properly considered the defendant's subsequent arrests for two other robberies while on bond when sentencing the defendant); Daniels, 2003 WL 22519882, at *3 (holding that the trial court properly considered defendant's pending indictment for later offenses at sentencing); People v. Thomas, 59 Mich.App. 21, 228 N.W.2d 531, 532 (1975) (holding that a trial court's consideration of a new pending charge at a sentencing hearing, for the purpose of determining a pattern of conduct and defendant's character, was not improper absent a showing that the trial judge used the pending charge in determining defendant's sentence); but cf. State v. Westall, 116 N.C.App. 534, 449 S.E.2d 24, 34 (1994) ("It is well established that a trial judge may not consider, when imposing a sentence, other charges pending against a defendant for which he has not been convicted.").

Also see, U.S. v. Oxford, 735 F.2d 276 (7th Cir. 1984)(trial judge correctly took into consideration witness testimony that defendant had attempted to sell drugs to him while out on bond); Elias v. State, 93 Wis.2d 278, 286 N.W.2d 559, 562 (1980)("This court has stated that the trial court in imposing sentence for one crime can consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing"); State v. Helms, 130 Idaho 32, 936 P.2d 230(Ct.App.

1997)(court could consider offense committed between commission of charged offense and sentencing for that offense); People v. Johnson, 128 Ill. 2d 253, 131 Ill. Dec, 562, 538 N.E.2d 1118 (1989)(court could consider prior offenses even though they did not result in adjudications of guilt because they demonstrated a continuing disposition to criminal conduct and were relevant); People v. Wagner, 76 Il. App. 3d 965, 32 Ill. Dec, 304, 395 N.E.2d 414 (4th Dist. 1979)(court could consider similar behavior in jail even if uncharged); People v. Jones, 65 Ill. App. 3d 435, 22 Ill. Dec. 377, 382 N.E.2d 697 (4th Dist. 1978)(court could consider offenses that occurred in jail awaiting trial as bearing upon general moral character and inclination to crime); People v. Jones, 36 Ill. App. 3d 695, 344 N.E.2d 641 (1st Dist. 1976)(court could consider batteries committed following his arrest for the crimes charged where evidence bore upon defendant's conduct and potential rehabilitation); Lindsey v. State, 485 N.Ed.2d 71 (Ind. 1985); State v. Tokman, 412 So. 2d 561 (La. 1982)(court could consider sworn statements implicating defendant in pending cases); Martin v. State, 218 Md. App. 1, 96 A.3d 765 (2014)(court could consider uncharged or untried offenses); People v. Coleman, 266 A.D.2d 227, 697 N.Y.S.2d 683 (2d Dep't 1999)(court could consider subsequent arrest and indictment where there was legitimate basis for new charges).

One of the cases to which Petitioner cites is another Fourth District case, Reese v. State, 639 So. 2d 1067, 1068 (Fla. 4th DCA 1994). Reese held that "unsubstantiated allegations of misconduct may not be considered by a trial judge at a criminal sentencing hearing and to do so violates fundamental due process." Id. However, the court also stated in Reese that:

> a trial judge may consider other arrests at sentencing hearings if the defendant is given the opportunity to explain or offer evidence on the issue. Jansson v. State, 399 So.2d 1061 (Fla. 4th DCA 1981)." Likewise, it is clear that the presentence investigation report prepared by the Department of Corrections may permissibly contain the offender's prior arrest record. § 921.231(1)(c), Fla.Stat.

Id. Notably, the allegations in Reese were unsubstantiated where the prosecutor merely argued that the defendant was seen in other videotaped drug sales.

Petitioner references the presumption of innocence but the State would note that this presumption has not been violated. The State was required to substantiate the allegations of misconduct, and Petitioner had an opportunity to refute the allegations, just as would happen at a full-fledged trial on the new charge. In the instant case, the prosecutor detailed in great detail the evidence against Petitioner in his sentencing memorandum and again at the sentencing hearing. Further, Petitioner had an opportunity to disagree with the evidence in the defense sentencing memorandum and again at sentencing. Thus,

this case was not the equivalent of the "unsubstantiated allegations of misconduct" in Reese.

At the hearing, the State explained that Petitioner had been arrested for a new law violation and that new law violation was similar to the crime charged in the instant case. Further, the State presented reports of two separate fingerprints (a twelve point match and a fifteen point match to Petitioner's fingerprints) found on CD cases in the victim's burglarized car. (R1 86; R6 706-07) The State presented the victim's statement that Petitioner did not have permission to enter the victim's car or touch any of his belongings and that all of the CDs in the car were purchased with cellophane wrapping which was removed prior to the burglary. (R1 86) Finally, the State noted that the victim's car was in his driveway, which was only four miles from the defendant's current address. (R1 86-87) The court found probable cause for the new charge.

At sentencing, Petitioner requested a downward departure sentence of probation. (R6 701-05) Clearly, the fact that Petitioner was arrested several times while out on bond for the instant case was highly relevant to whether he could serve probation. In other words, the new arrest was relevant here to show that Petitioner could not follow the rules of bond, useful in determining whether Petitioner would be a good candidate for probation.

Thus, in the instant case, the trial court could properly consider Petitioner's subsequent arrest for a new burglary charge. Under the circumstances, the new burglary charge was not an unsubstantiated allegation and it was relevant. Moreover, Petitioner had, but declined, an opportunity to rebut the allegations. Petitioner could have substantively replied to the new law charges in the sentencing memorandum and at the sentencing hearing, say, by simply putting on brief testimony that he was not guilty. Compare Mirutil v. State, 30 So. 3d 588, 590 (Fla. 3d DCA 2010)(defendant maintained his innocence). Despite Petitioner's assertion otherwise, Petitioner's ability to respond was not, in fact, illusory in the instant case. Notably, Petitioner would have been faced with the same decision regarding whether or not to testify at a full-fledged trial on the merits of the new law charges.

Also, counsel and the judge discussed the new arrest and supporting evidence at the sentencing hearing only briefly in comparison to the testimony from Petitioner and his mother which went on for many pages longer. (R6 680-705; 706-08) This shows that no undue emphasis was placed on the new burglary charge.

Petitioner cites to a laundry list of cases in support of his arguments. (IB 14-15) However, all of these cases are distinguishable or otherwise not applicable. Hernandez v. State, 145 So. 3d 902 (Fla. 2d DCA 2014), is easily distinguishable in

that Petitioner was, in fact, charged with the new law crime herein. McGill v. State, 148 So. 3d 531 (Fla. 5th DCA 2014); Craun v. State, 124 So. 3d 1027 (Fla. 2d DCA 2013); Martinez v. State, 123 So. 3d 701 (Fla. 1st DCA 2013); Reese v. State, 639 So. 2d 1067 (Fla. 4th DCA 1994); and Challis v. State, 40 Fla. L. Weekly D321 (Fla. 2d DCA January 30, 2015), are all distinguishable in that they all involved unsubstantiated allegations of other crimes, in contrast to the instant case in which the allegations were substantiated.

Epprecht v. State, 488 So. 2d 129, 130 (Fla. 3d DCA 1986) is similarly distinguishable. In that case, Epprecht had never even been charged with committing some of the alleged previous acts of violence and was acquitted of the other offense with which he was charged. Here, Petitioner was, in fact, charged with the subsequent burglary of a conveyance, and the State outlined its evidence against Petitioner, and Petitioner had not been acquitted.

Finally, in Goldstein v. State, 40 Fla. L. Weekly D137, 140 (Fla. 2d DCA January 7, 2015), there was no actual evidence that the defendant could or would commit new criminal acts of abuse which the defendant was never accused of committing. Rather, the judge was merely speculating that this was so. But here, there was, in fact, evidence that Petitioner had committed a new law violation. Moreover, the new law violation that Petitioner

committed was a burglary, and the charged crime before the court for sentencing was also a burglary. Goldstein is easily distinguished.

To the extent that Petitioner makes much of the CPC score, the State would submit Petitioner's argument is not well taken. At sentencing, Petitioner scored a minimum sentence of 35.7 months on his CPC scoresheet. (R1 114-115) Petitioner requested a downward departure of probation. (R6 701-05) The State asked for an adult sentence of **twenty years** in prison. (R1 88) The maximum sentence was **life** for the burglary and five years for the grand theft. (R6 658, 661). The judge only sentenced Petitioner to twelve years. (R6 709) Petitioner's sentence hardly shows that the judge placed "undue emphasis on the subsequent arrest and charge in imposing sentence." (IB 13)

Rather, in denying Petitioner's request for probation and imposing sentence, the judge noted that Petitioner betrayed the trust of his neighbors across the street, saying "those people's lives are changed forever, forever. You're talking about people who had to move out of the house because of their terror about what had happened to them, that they got victimized because the defendant was the one that scoped their house on New Year's Day, brought his friends over, stole [sic] their house, trashed their house. He's convicted at trial of grand theft. He pleads to the burglary. First he's deserving of an adult sanction. … He's

deserving of a sentence in the Department of Corrections." (R6 708-09)

Nor did the judge impose sentence before calculating the CPC score as in Cosme v. State, 111 So. 3d 280 (Fla. 4th DCA 2013). And, the record shows the judge was well aware of the scoresheet and of its "anchoring effect" on the trial court's sentencing discretion. It is well worth noting that Petitioner could have been sentenced up to life for the burglary, and that the State asked for a twenty year sentence, but the judge only gave Petitioner a twelve year sentence. This hardly smacks of an unreasonable exercise of judicial discretion.

For all the reasons stated above, the trial court did not err in taking note of Petitioner's arrest and pending charges for another burglary which occurred subsequent to the instant offenses. This Court must uphold the decision of the Fourth District.

E. Harmless Error.

Assuming, arguendo, that the reference to the car burglary was evidence that the judge took improper considerations into account at sentencing, the State would tentatively submit there still is no necessity for reversing the sentence. Under the circumstances, the error, if any, was not a harmful one. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Goodwin v. State, 751 So. 2d 537 (Fla. 1999). That is, the arrest for the car burglary

was not the only arrest Petitioner had while out on bond for the instant crime. Petitioner was arrested for trespass after warning at the Boynton Beach Mall, Petitioner failed to appear, thus necessitating the issuance of a misdemeanor warrant, and, as defense counsel conceded, Petitioner ultimately accepted a time served sentence. This means that Petitioner had an arrest and conviction while out on bond which, **because it was a conviction**, could definitely be considered in imposing sentence. The State would tentatively suggest that the second arrest while out on bond was essentially duplicative of properly admitted evidence about the first arrest; that is, the judge could and would already permissibly have been taking into account that Petitioner had been arrested while out on bond for the instant crime.

Again, this Court must uphold the decision of the Fourth District.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court UPHOLD the decision of the Fourth District and DENY this petition for review.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on April 13, 2015: Patrick Burke, Assistant

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CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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