

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
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Court Clerk

STATE OF FLORIDA,
Petitioner,

vs.

CASE NOS. 68,081, 68,088

MICHAEL ALLEN PENTAUDE,
Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecution and Appellee in the courts below, will be referred to as "Petitioner." Respondent, Michael Allen Pentaude, the criminal defendant in the trial court and the Appellant in the First District Court of Appeal, will be referred to as "Respondent."

References to the record on appeal, which contains the legal documents filed in this cause, will be designated "(R)." References to the transcript of testimony and proceedings at the sentencing hearing will be designated "(T)."

All emphasis is supplied by Petitioner.

SUMMARY OF ARGUMENT

Under Fla.R.Crim.P. 3.701(d)(14) a trial court must be allowed to consider the number, nature or circumstances of a violation(s) for purposes of departing beyond the next higher cell of a recommended sentence under the guidelines.

Furthermore, while the Florida appellate courts have consistently held that circumstances surrounding a violation can be clear and convincing reasons for a departure beyond a one cell increase, they have also interpreted this Court's decision in Hendrix v. State, 475 So.2d 1218 (Fla. 1985) narrowly to mean that a departure cannot be based solely upon a defendant's prior criminal convictions.

ARGUMENT

ISSUE

UNDER RULE 3.701(d)(14) A PERSON FOUND GUILTY OF A VIOLATION OF PROBATION MAY BE SENTENCED BEYOND THE NEXT HIGHER CELL UPON CONSIDERATION BY THE TRIAL COURT OF CIRCUMSTANCES SURROUNDING THE VIOLATION FOUND TO BE CLEAR AND CONVINCING REASONS FOR DEPARTURE.

Under Respondent's reading of Fla.R.Crim.P. 3.701(d)(14), a defendant who commits hundreds of substantive criminal violations of probation can be sentenced to no more than one cell beyond his recommended range if the trial judge cannot provide clear and convincing reasons other than the number or nature of the violations themselves. Petitioner submits that the rule makers never intended to restrict a trial judge's discretion in such a manner.

As cited in Petitioner's initial brief, the Second and Fifth District Courts of Appeal agree with the lower court that the provision in question does not preclude a trial court from sentencing a defendant to any term within the statutory limits based solely upon the probation violation as long as the court expresses its reasons for such a departure. Moreover, the lower court, as well as other appellate courts, have read Hendrix v. State, supra, narrowly to mean that a departure from the guidelines cannot be based on the defendant's prior criminal convictions alone. Thus, it is submitted that nothing in Hendrix prevents the sentencing judge from considering the

timing, escalating pattern, or a violent nature of the prior record, or any other characteristics which are not already factored into the scoresheet. Since Hendrix, the First, Second, and Fifth District Courts of Appeal have held that circumstances relating to prior convictions which are not factored into the scoresheet can support clear and convincing reasons for departure. In Johnson v. State, 477 So.2d 56 (Fla. 5th DCA 1985), May v. State, 475 So.2d 1004 (Fla. 5th DCA 1985), Smith v. State, 10 F.L.W. 2634 (Fla. 5th DCA November 29, 1985), and Booker v. State, 10 F.L.W. 2751 (Fla. 2d DCA December 13, 1985), it was held that Hendrix does not preclude consideration of a defendant's escalating pattern of criminal involvement for departure purposes. In Moore v. State, 11 F.L.W. 163 (Fla. 1st DCA January 7, 1986), the lower court found the violent pattern of criminality to be a valid reason, and in Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985), it determined that habitual offender status could properly be considered for departure purposes. See also Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984), and Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984) (the timing of a defendant's prior offenses for which he has been convicted is a valid basis for departure), and Williams v. State, Case No. BG-83 (Fla. 1st DCA March 5, 1986) (defendant's continuing and persistent pattern of criminal activity together with the timing of offenses is a clear and convincing reason).

It must be noted that Respondent's contention that his commission of a crime while on probation cannot be a reason

for departure because it was already scored as a "prior conviction" in the scoresheet is incorrect (R 87). Thus, it is not precluded from consideration for departure purposes. It must also be made clear that Respondent's subsequent conviction for grand theft auto while on probation was not included in the affidavit of violation of probation (R 52-53). However, inasmuch as his conviction and incarceration was unrefuted at the probation revocation hearing, the trial judge properly found the conviction to be a clear and convincing reason for departure (T 2-3, R 54). It is also submitted that Respondent's incarceration was a reason behind his violations in that he was unable to maintain his residence and employment (Count I), could not work at the employment approved by the probation officer (Count III), could not pay for room and board (Count IV), could not pay court costs (Count VI), and did not remain at the Restitution Center (Count VII). (R 49, 52-53).

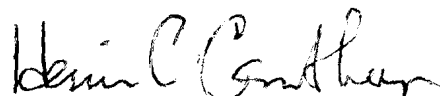
Therefore, it is submitted that the lower court properly found that, as long as a trial court expresses its reasons for departure where a probation violation sentence is greater than the "next higher cell," it has complied with the intent of Rule 3.701(d)(14). It is requested that the question certified be answered in the affirmative.

CONCLUSION

Petitioner urges this Court to answer the certified question in the affirmative.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



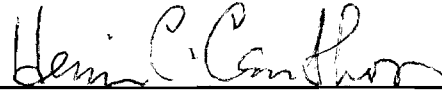
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kenneth L. Hosford, 345 Office Plaza, Tallahassee, Florida, 32301, on this 14th day of March, 1986.



HENRI C. CAWTHON