IN THE SUPREME COURT OF FLORIDA

DAVID J. QUARTERMAN,

Petitioner,

v. CASE NO. 70,567

STATE OF FLORIDA,

Respondent.

FILED
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JUL 6 1987
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ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

**BRIEF OF THE RESPONDENT**

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## PRELIMINARY STATEMENT

DAVID J. QUARTERMAN will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA will be referred to as the "Respondent". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

## STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by the Petitioner.

## SUMMARY OF THE ARGUMENT

This Court's holding in Williams v. State, infra, does not require a negative answer to the certified question in this case. In Williams, the departure sentence was illegal because it was not supported by a clear and convincing, valid reason. However, the defendant's agreement to a sentence within the statutory maximum is itself a clear and convincing reason for departure. Because petitioner's sentence is supported by a valid reason, it is not rendered invalid as was Williams'. Therefore, there are situations where a judge may base a departure on a defendant's acquiescence to a sentence within the statutory maximum.

Petitioner has waived any argument that any of the other reasons are invalid for lack of a contemporaneous objection. Though some of the reasons are invalid reasons for departure, at least two and perhaps three valid reasons were given. The cause must therefore be remanded for resentencing. The judge should be able again to depart for valid reasons.

## ARGUMENT

## ISSUE I

WHETHER THE TRIAL COURT MAY EXCEED THE RECOMMENDED GUIDELINES SENTENCE MERELY BECAUSE THE DEFENDANT ACQUIESCES TO HIS PLEA AGREEMENT?

The Second District Court of Appeal has certified the following question:

> May a trial judge exceed the recommended guidelines sentence based upon a legitimate and uncoerced condition of a plea bargain?

Petitioner urges that in light of this Court's holding in Williams v. State, 500 So.2d 501 (Fla. 1986), the answer must be "no". The state on the other hand, asserts that Williams does not mandate a "no" answer to the question in this case.

In Williams, the defendant pled guilty to burglary, grand theft and petit theft pursuant to an agreement with the state. The trial judge conditioned a sentence within the presumptive guidelines range on three contingencies, one of which was Williams' appearance at sentencing. When he failed to appear, the judge departed from the guidelines, citing the failure to appear as the reason for departure.

This Court remanded the cause for resentencing based on a finding that the failure to appear was a crime in itself which could not be a valid reason for departure since the guidelines prohibit departure for an offense for which the defendant has not been convicted. Williams, supra at 503, citing **Fla. R. Crim. P. 3.701(d)(11).** The Court further found that since this departure sentence was unsupported by clear and convincing reasons, it was

an illegal sentence and that a defendant cannot, by agreement, confer on the court the authority to impose an illegal sentence. Id.

While the facts in the present case are strikingly similar, there are subtle differences which do not require the same holding as in Williams and which allow the Court to answer the certified question in the affirmative, albeit, with some limitations.

Mr. Quarterman pled guilty to armed robbery. The negotiated plea to a five and one half year sentence (which was within the presumptive guidelines range) was contingent on Quarterman's appearance at sentencing. Sentencing was continued to accomodate the defendant's request to go see a sister who was in the hospital. When Quarterman failed to appear at this sentencing, the trial judge departed from the guidelines, citing the following reasons:

> Juvenile record not scored; Defendant failed to appear for sentencing; new offense committed between plea and sentencing date (1 week); Defendant agreed court could impose maximum - i.e., life imprisonment, if he F.T.A.'d and he did; professional manner which crime was committed any one of these reasons, standing alone, I would deviate upward.

The crucial difference between Williams and this case becomes important here. The departure sentence in Williams was rendered illegal because it was not supported by any clear and convincing reasons. In Quarterman, the trial court supported the departure with at least one valid reason - Quarterman's

acquiescence to the sentence.[1] The operative reason for departure is that Quarterman agreed to abide by the system and then failed to live up to his agreement.

Williams' acquiescence wasn't cited as a reason for departure so the departure sentence was rendered illegal. Quarterman's agreement to the sentence is in itself a clear and convincing reason for departure, making the imposition of a departure sentence legal.

The rationale in Williams is undoubtedly correct that a departure sentence unsupported by clear and convincing reasons is illegal, and that a sentence in excess of the statutory maximum is illegal. However, it would not be correct to find that a departure sentence supported by as clear and convincing a reason as the defendant's agreement to a sentence within the statutory maximum is illegal.

Quarterman didn't agree to an obviously illegal sentence of, say, 16 years where the statutory maximum is 15. He agreed to be sentenced within the statutory maximum. No law (except for the Habitual Offender Statute, which allows for the enhancement of the statutory maximum) gives courts the right to exceed the statutory maximum sentence set by the legislature. But, the legislature has granted courts the right to exceed a presumptive range as long as the departure is supported by clear and convincing

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[1] The other reasons and their impact will be addressed later in this brief.

reasons. Agreement is a clear and convincing reason in this case because the defendant has a right to choose, for whatever reason, that which is in his own best interest in entering a guilty plea.

Plea bargain sentences have consistently been recognized as a valid reason for departure from a recommended sentence even where the court failed to state other reasons for departure. Houston v. State, No. BL-439 (Fla. 1st DCA Feb. 11, 1987)[12 F.L.W. 494]; Green v. State, 460 So.2d 378 (Fla. 2d DCA 1984); Bell v. State, 453 So.2d 478 (Fla. 2d DCA 1984); Kay v. State, 452 So.2d 1147 (Fla. 5th DCA), pet. for rev. denied, 459 So.2d 1041 (Fla. 1984).

The cases cited in Williams to support the statement that a trial court cannot impose an illegal sentence pursuant to a plea bargain, Robbins v. State, 413 So.2d 840 (Fla. 3d DCA 1982) and Smith v. State, 358 So.2d 1164 (Fla. 2d DCA 1978), support the theory that acquiescence to a sentence within the statutory maximum is a clear and convincing reason for departure. The sentences in Robbins, supra and Smith, supra were not sentences in excess of guidelines recommendations, but were illegal because of some fundamental error or because they exceeded the statutory limit. The sentence in this case is free of such fundamental error and does not exceed the statutory maximum, so the agreed to sentence is not illegal.

Quarterman pled guilty and agreed to risk a sentence up to the statutory maximum in exchange for being allowed to visit his sick sister, rather than going directly to jail. The judge

departed from the guidelines for a clear and convincing reason - Quarterman's agreement. Because the sentence was not beyond the statutory maximum and was supported by clear and convincing reasons, Quarterman did not acquiesce to an illegal sentence.

The presence of reasons for departure other than defendant's agreement requires discussion. The defendant did not object to the reasons for departure at either the trial or appellate court level. He now asserts, by way of a footnote, that two of the reasons: an unscored juvenile record and the professional manner in which the crime was committed, are invalid reasons for departure. However, petitioner has waived any arguments as to the validity of the reasons for departure by the lack of contemporaneous objection and the failure to argue the issue on direct appeal. See Dailey v. State, 488 So.2d 532 (Fla. 1986) which requires a contemporaneous objection to preserve for appellate review any factual bases which are matters outside the record.

Because petitioner has waived any objection to these two reasons, this Court must assume they are supported by the evidence below. Unscored juvenile offenses have been found a valid reason for departure; Weems v. State, 469 So.2d 128 (Fla. 1985) as has the professional manner in which a crime is committed. Mullen v. State, 483 So.2d 754 (Fla. 5th DCA 1986) and Brown v. State, 480 So.2d 225 (Fla. 5th DCA 1985).

Taking the reasons for departure in order: the first, unscored juvenile offenses is valid. See Weems, supra. The second and third, failure to appear and commission of new crimes, are

invalid. See **Rule 3.701(d)(11), Fla. R. Crim. P.** and Williams, supra. The fourth, defendant's agreement, will be deemed either valid or invalid depending on the outcome of this case. The fifth, the professional manner in which the crime was committed, is valid. See, Mullen and Brown, supra. The final statement that the judge would have departed for any one of the reasons may have been rendered nugatory by the footnote in The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311, 312 (Fla. 1985), but compare Leopard v. State, 491 So.2d 1284 (Fla. 1st DCA 1986).

Accordingly, whether the Court finds defendant's argument a valid or invalid reason for departure, the departure is based on some valid and some invalid reasons. Remand for resentencing is therefore required by Albritton v. State, 476 So.2d 158 (Fla. 1985). The judge should again have the option to depart for clear and convincing reasons.

## CONCLUSION

Based on the above stated facts, arguments and authorities, Respondent would ask that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

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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. Regular Mail to Allyn Giambalvo, Assistant Public Defender, Criminal Court Building, 5100 - 144 Avenue North, Clearwater, Florida 33520, this 2nd day of July, 1987.

Lauren Hafner Sewell
OF COUNSEL FOR RESPONDENT.