

IN THE SUPREME COURT OF FLORIDA

CARL PUFFINBERGER,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 75,917

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PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

IN LIGHT OF WEEMS, TO WHAT EXTENT MAY A TRIAL COURT CONSIDER A NON-SCOREABLE JUVENILE RECORD IN AGGRAVATING A SENTENCE ABOVE THE GUIDELINES RANGE?

Respondent argues that the district court cases cited by petitioner "have properly cited Weems [v. State, 469 So.2d 128 (Fla. 1985)] only in support of the proposition that a non-scoreable juvenile record may be used for the purpose of departing from the sentencing guidelines." (Respondent's Brief - 6). Respondent then pretends that other district courts have not held that Weems allows a non-scoreable juvenile record as a reason for departure only when that juvenile record is extensive. Not so. In petitioner's case the Fourth District acknowledges that its view of Weems varies from opinions from other district courts:

Under Weems, wherein the defendant's thirteen juvenile dispositions were held to be valid considerations in sentencing above the guidelines, a defendant's unscored juvenile record, containing offenses disposed of by adjudications equivalent to conviction of an adult, can be a clear and convincing reason for departure. *Id.* Some district courts of appeal have taken the Weems opinion to imply that to be justification for departure, the juvenile record must be extensive. See Blue v. State, 541 So.2d 736 (Fla. 1st DCA 1989); Carter v. State, 510 So.2d 930 (Fla 5th DCA 1987).

Puffinberger v. State, 558 So.2d 189 (Fla 4th DCA 1990).

Since the respondent's brief does not notice that any difference of opinion exists among the district courts of Florida, it therefore offers no suggestion as to how the growing conflict should be resolved. If respondent means to suggest that the


district court cases contrary to the Fourth District's opinion be overruled and that all non-scoreable juvenile offenses be allowed as reason for departure in aggravation regardless of how minor the record may be, then the result will be the anomalous situation noted by the First District: although too remote to be scored, a minor juvenile record may be the basis for imposing a longer sentence than what would have been possible if the juvenile record were scored. Walker v. State, 519 So.2d 1105 (Fla. 1st DCA 1988). Since the extent of a departure sentence itself can no longer be reviewed on appeal if the departure reason is valid, Section 921.001(5), Florida Statutes (1986), petitioner suggests that the holding of Weems needs to be limited to its facts so that only a significant or extensive unscored juvenile record may be properly considered as a reason for departure. Section 921.001(5) also requires that a "departure sentence shall be based upon circumstances or factors which reasonably justify the aggravation or mitigation of the sentence." The question certified is to what extent may a trial judge consider a non-scoreable juvenile record in aggravating a sentence above the guidelines range. Because unjustly harsh sentences may otherwise result, petitioner urges this Court to answer that the extent of the non-scoreable juvenile record must be serious before those offenses can reasonably justify the aggravation of sentence.

CONCLUSION

Based on the argument and authorities cited here and in petitioner's initial brief on the merits, it is respectfully requested the decision of the district court should be quashed and remanded for instructions that only a substantial or extensive non-scoreable juvenile record may justify departure under Weems.

Respectfully Submitted,

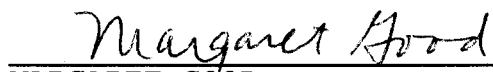
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOSEPH TRINGALI, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 16th day of July, 1990.


MARGARET GOOD
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