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IN THE SUPREME COURT OF FLORIDA

WILLIE GORDON,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

Case No. 77,576

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner will rely on the statement in his initial brief on the merits.

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon his statement of the Case and Facts as set forth in his initial brief. Petitioner notes however Respondent's reference to Williams rule evidence adduced during trial and referred to by the circuit court at sentencing.R308-423,639,641

These facts are not relevant to resolution of the instant issue as this allegation had not resulted in a conviction at the time of the instant sentencing. R 597,599,647. Moreover, the circuit court's statement when taken in context, reflects that the court did not consider the evidence as a factor in its sentencing decision but relied only upon the ground stated in the written departure order. R639

ARGUMENT

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE.

The record unequivocally demonstrates that the lone basis for departure articulated by the circuit court at bar both orally and in writing was timing. R639,641-643,667, No additional reference was made by the trial court to a continuing and persistent pattern of criminal conduct as a ground to depart. The state's effort to boot strap its claim that the present ground for departure is lawful because the record supports a finding of timing as well as pattern must fail since it is the trial court not the states ground for departure that is under scrutiny.

To advance its claim that the record supports a finding of continuing and persistent pattern, Respondent resorts to Williams rule evidence admitted at trial. R308-423 However, this allegation was just that. It had yet to result in a conviction. R597,599,647. Consequently, it is not a proper consideration for departure. Fla.R.Crim.P. 3.701(d)11(1987) ("Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction.")

Furthermore, the primary purpose of the guidelines is to prevent arbitrary and disparate sentences. Thus, reasons for departure may not be based on unfettered subjectivity. The terms "continuing" and "persistent" pattern of criminal activity are totally subjective. Unlike an "escalating" pattern, a "continuing" and "persistent" pattern has not been defined by the legislature

or the courts.¹ Nor has Respondent offered any workable definition for these terms. Instead, the highly subjective terms result in one finding a "continuing" or "persistent" because "I know a continuing or persistent pattern of criminal activity when I see it." See Liscomb v. State, 15 F.L.W. D2227, 2229 (Fla. 5th DCA Sept. 6, 1990) (Coward, J., dissenting).

If "continuing" and "persistent" pattern of criminal activity has any identifiable meaning, it probably refers to the situation where a person is continuously committing a specific type of crime time after time. For example, at bar Petitioner committed several grand thefts. However, this type of "continuing" and "persistent" pattern was specifically factored into the guidelines through multiplier factors. (R 665). Thus Petitioner has already been punished more severely for commission of the same type of offense.

Additionally, there is a field of relationships between the offenses constituting a defendant's prior record. Specifically, escalating pattern of criminal conduct has been defined and codified as an authorized reason for departure. § 921.001(8), Fla. Stat. (1987). The codification represents the portion of the field of prior record relationships which has been deemed sufficient for departing from the guidelines. Due to the consideration of the field of prior record relationships, and the failure to codify that relationship other than escalating patterns warrant departure, the codification constitutes a legislative pre-emption of the field of

¹ Escalating pattern has been defined in § 921.001(8), Florida Statutes (1987) and by case law. See Keys v. State, 500 So.2d 134 (Fla. 1986) (commission of four crimes escalating from property to persons).

prior record relationships justifying departure. See Liscomb 15 F.L.W. at 2229 (Coward, J., dissenting).

Respondent also seeks to justify timing alone as a ground for departure by reliance upon Williams v. State, 504 So.2d 392 (Fla. 1987). However, this Court in State v. Simpson, 554 So.2d 506 (Fla. 1989) specifically rejected such a notion and in fact indicated that timing alone being invalid was "entirely in harmony with Williams v. State, 504 So.2d 392 (Fla. 1987), in which sufficient additional facts were introduced to establish an escalating pattern of criminality". Simpson, 554 So.2d at 506, ftnt.3.² Mere reliance on temporal proximity would result in arbitrary and disparate sentences.³

Respondent relied on Jordan v. State, 562 So.2d 820 (Fla. 4th DCA 1990) for the claim that any temporal proximity of less than one year justifies a departure sentence. However, the reasoning in Jordan, illustrates the very problem with using temporal proximity to depart from the guidelines.⁴ The trial court erred in departing from the recommended guideline sentence based on the temporal proximity of his release from prison.

Respondent's primary analysis consists of the public policy of increasing sentences of "typical" inmates due to the cost of criminal activity to society. Respondent's brief at 5-7. The

² See also Frederick v. State, 556 So.2d 471, 473 (Fla. 3d DCA 1990) ftnt.1.

³ See pages 8 through 9 of Petitioner's brief on the merits.

⁴ See pages 7 through 8 of Petitioner's brief on the merits.

analysis alleges that "typical" inmates are "persistent" in their criminal activity. The public policy Respondent speaks of would be advanced by increasing the guideline recommendations rather than by departing in specific cases. The guidelines range is favored in the case of the "typical inmate". A departure sentence is reserved for the atypical defendant only.

