

IN THE SUPREME COURT OF FLORIDA

RICKY HOPE,)
)
 Petitioner,)
)
 vs.) CASE NO. SC96352
) Lower Tribunal No. 4D98-2093
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER'S BRIEF ON THE MERITS

On review from the Circuit Court
of the Seventeenth Judicial Circuit,
In and For Broward County, Florida
[Criminal Division].

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ISSUE PRESENTED:

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal, "T" the transcript.

CERTIFICATION OF FONT

Counsel for petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner, Ricky Hope, was charged by way of an information, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, with a single count of burglary of attempted first degree murder with a firearm. R. 1-2. A jury verdict was returned finding Petitioner guilty as charged. T. 355; R. 25.

At a subsequently held sentencing hearing, it was determined that Petitioner's total sentencing point score was 162 (one hundred sixty-two). R. 32-3. This was arrived at by factoring his current conviction for attempted first degree murder, prior adult convictions for carrying a concealed weapon and grand theft, and a prior juvenile delinquency adjudication for robbery with a deadly weapon. R. 32. An additional 40 (forty) points were assessed for severe victim injury, as well as 30 (thirty) points for "prior serious felony." R. 32-3. Petitioner's sentencing point total translated into a sentencing range between 100.5 (one hundred point five) months and 167.5 (one hundred sixty-seven point five) months imprisonment. R. 33. The trial court departed from the sentencing range and imposed a 30 (thirty) year term of imprisonment. R. 35-7; ST. 28-9. In so doing, it provided the following oral and written reasons: (1) Petitioner's excessive non-scorable juvenile record; (2) the primary offense for which Petitioner was being sentenced was a crime with a sentencing level of seven (7) or higher and he had previously been convicted of offenses of a level

eight (8) or higher; and (3) Petitioner was not amenable to rehabilitation as evinced by an escalating pattern of criminal activity, specifically a pattern of violent criminal conduct beginning in 1991 with a strong armed robbery, then to an armed robbery and then the current offense of attempted first degree murder. ST. 26-8; R. 28.

Petitioner's pre-sentence investigation ("PSI"), the factual basis for the trial court's guidelines departure ruling, showed that Petitioner had 19 (nineteen) allegations of juvenile criminal conduct dating from 1991. SR. Of this number, 7 (seven) resulted in final, judicially dispositive delinquency findings. SR. Of these 7, 4 (four) were for felony-type crimes; burglaries in 1992 and 1993, auto theft in 1993 and robbery with a deadly weapon in 1993. SR. The remaining 3 (three) were for misdemeanor-type offenses. SR. The other 12 (twelve) allegations consisted of juvenile cases that were either resolved non-judicially, held open without any disposition, or nolle prosequi. SR. Of the prior criminal conduct cited by the trial court as its factual basis for the departure sentence was a 1991 strong-arm robbery case which was resolved non-judicially and a 1992 armed robbery which was "Held open" with no record of any sort of disposition at the time of the sentencing hearing. SR; R. 28; ST. 26-8.

Petitioner timely filed his Notice of Appeal to the Fourth District Court of Appeal. R. 41. On appeal, he argued that the trial court erred in imposing an upward guideline departure

sentence and that the assessment of 30 sentencing points for "prior serious felony" was was fundamental error. The Fourth District Court of Appeal rendered a decision affirming the trial court's upward departure sentence. In so doing, without explanation,¹ it found that one of the trial court's three reasons, that appellant was not amenable to rehabilitation as evidenced by an escalating pattern of criminal conduct, was valid. The Fourth District also affirmed the assessment of 30 points for a prior serious felony, finding that Petitioner failed to preserve this issue for appellate review.

Petitioner timely filed his pro se notice to invoke this Court's discretionary jurisdiction on the ground that the Fourth District's decision was in direct conflict with a decision of another district court of appeal. This Court's order of November 15, 1999, accepted jurisdiction and dispensed with oral argument. This Court subsequently granted Petitioner's motion for appointment of counsel. On January 25, 2000, this Court granted Petitioner's Motion to Stay Proceedings pending this Court's disposition of Hyden v. State, infra. This Court disposed of the Hyden matter in Maddox v. State, infra. This brief, by and through undersigned counsel, is Petitioner's brief on the merits.

¹As authority for its decision, the Fourth District cited this Court's decision in State v. Darrisaw, 660 So. 2d 269 (Fla. 1995).

SUMMARY OF THE ARGUMENT

Point I:

The error in assessing 30 sentencing points for "prior serious felony" on Petitioner's guidelines scoresheet is subject to appellate review. Although Petitioner failed to interpose a contemporaneous objection to this point assessment, such was fundamental error. The fundamental nature of this guidelines scoresheet error is two-fold. It is a serious, patent error, inasmuch as it is apparent on the face of the record on appeal and its qualitative effect on the sentencing process and a quantitative effect of Petitioner's sentence. Moreover, the error rose to the level of a violation of Petitioner's right to due process of law, since the 30 point assessment was a result of the utilization of the 1995 sentencing guidelines. The use of the 1995 sentencing guidelines is prohibited for felony offenses committed between October 1, 1995 and May 24, 1997. Petitioner's crime was committed on July 24, 1996, well within the window period that this Court has held that the 1995 are inapplicable.

Point II:

The sentence imposed by the trial court upon Petitioner, 30 years imprisonment, was an invalid guidelines departure. The sole ground found to be valid by the Fourth District Court of Appeal, that the current offense evinced an escalating pattern of violent conduct, is not supported by the record on appeal. The record

reflects that the trial court's reliance on various prior juvenile charges was inappropriate, as they did not reflect either an adjudication or final disposition at the time of sentencing. Additionally, the sole prior violent crime which could be relied upon was neither more serious nor violent than the offense upon which Petitioner was sentenced.

ARGUMENT

POINT I

ISSUE PRESENTED:

THE ADDITION OF 30 SENTENCING POINTS ON PETITIONER'S GUIDELINES SCORESHEET FOR A PRIOR SERIOUS FELONY WAS FUNDAMENTAL ERROR WHICH MAY BE REVIEWED ON APPEAL, NOTWITHSTANDING THE LACK OF A CONTEMPORANEOUS OBJECTION.

The trial court's assessment of 30 sentencing points for "prior serious felony" was erroneous. Although Petitioner did not object to the addition of these points at the time he was sentenced, the error is subject to appellate review because, under the facts of the present case, it is a fundamental error.

The crime of which Petitioner was convicted, attempted first degree murder with a firearm, was committed on July 24, 1996. The trial court utilized the 1995 version of the sentencing guidelines (R. 32-3), §921.0001, Fla. Stat. (1995); Laws of Fla. Ch. 95-184, §3, to impose Petitioner's current, 30 year sentence (R. 32-3), which was pursuant to a guidelines departure (see Point II, infra). The scoresheet reflects that 30 sentencing points were added for a "prior serious felony (R. 33). Although Petitioner did not object to the addition of these 30 sentencing points at the time of sentencing, he argued before the Fourth District Court of Appeal that this sentencing enhancement was fundamentally erroneous, as its enabling statute had yet to be enacted at the time the crime

was committed. The Fourth District Court of Appeal did not rule on the merit of Petitioner's argument; rather, citing its prior decision in Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998), it deemed that the error was not preserved for appellate review. Hope v. State, 736 So. 2d 1256 (Fla. 4th DCA 1999).

This Court addressed the Fourth District's Hyden decision in Maddox v. State, Case no. SC92805, SC93966 (Fla. May 11, 2000). In so doing, this Court held, inter alia, that no provision of the Criminal Appeal Reform Act of 1996, §924.051, Fla. Stat. (Supp 1996) or this Court's prior decisions prevent appellate review of unpreserved sentencing error which are fundamental error. Fundamental error include those errs that are apparent on the face of the record on appeal and error which involve a violation of a defendant's due process rights. With regard to scoresheet error, the Maddox decision recognized that it is important for a trial court to utilize a properly calculated scoresheet when imposing a sentence. While not all scoresheet error automatically require reversal, Maddox, supra, citing State v. Mackey, 719 So. 2d 284 (Fla. 1998), when assessing whether an unpreserved scoresheet error is apparent on the face of the record, and thus subject to appellate review, an appellate court "should consider the qualitative effect of the error on the sentencing process and whether the error was likely to cause a quantitative effect on the defendant's sentence." Maddox v. State, supra.

The addition of the 30 sentencing enhancement points on

Petitioner's scoresheet was an error apparent on the face of the record. The added points effected the quality of the sentencing process by increasing the point total, and thus Petitioners sentencing range. Although the trial court imposed a departure sentence of 30 years imprisonment, the statutory maximum for attempted first degree murder, the quantity of the sentence, was still effected, as the departure sentence was based on an erroneously high guidelines range.

In State v. Mackey, supra, this Court held that there was no longer a per se reversal of guideline departure sentences where there was a scoresheet error. Id. at 284. In Mackey, the petitioner complained that his guidelines departure sentence had been premised on the wrong guidelines scoresheet. The trial court, in Mackey, had erroneously used a 1991 scoresheet, instead of one under the 1994 sentencing guidelines. This Court found that the utilization of the incorrect scoresheet had no qualitative or quantitative effect on his departure sentence, inasmuch as had the correct scoresheet been used, his point total and potential sentence would have been greater to the extent that the sentence he ultimately received would not have been a departure under the 1994 guidelines. Id. The present case is distinguishable from Mackey. The erroneous 30 point enhancement increased, not decreased, Petitioner's potential guidelines sentence.

Although not previously address, the 30 point prior serious felony enhancement is also erroneous, as well as other point

assessments on Petitioner's guidelines scoresheet (R. 32-3), because the 1995 sentencing guidelines have, heretofore, been held to be held to be unconstitutional. Heggs v. State, 25 Fla. L. Weekly S138 (Fla. February 17, 2000). In Heggs, as well as in Maddox, this Court held that it was fundamental error to utilize the 1995 sentencing guidelines scoresheet for crimes committed between October 1, 1995 and, at least, September 30, 1996. This window period has since been set to run from October 1, 1995 to May 24, 1997. Trapp v. State, Case no. SC96074 (Fla. June 1, 2000). The 1995 guidelines were deemed to be unconstitutional, as their original enactment violated the single-subject requirement of the Florida Constitution. This, in turn, violated fundamental liberty due process interests of those whose sentence was adversely affected. Maddox, supra. Petitioner's offense was committed on July 24, 1996, well within the window period that the 1995 guidelines were constitutionally invalid. Heggs, supra; Trapp, supra. If there was any doubt as to the validity of Petitioner's originally stated ground for the inapplicability of the 30 point sentencing enhancement, certainly, in light of the Heggs decision, it is now clear that the use of entire 1995 scoresheet in Petitioner's case was erroneous.

Petitioner's Initial Brief was filed with the Fourth District prior to this Court's announcement of Fla. R. Crim P. 3.800(b)(2) (January, 2000). Inasmuch as the error in using the 1995 guidelines scoresheet is fundamental and fundamental error may be

corrected by an appellate court without the necessity of a contemporaneous objection, Maddox, supra; Heggs, supra, Petitioner submits that this Court should find that the use of the 1995 guidelines in the instant case was erroneous and the error effected both the quality of the sentencing process and quantity of Petitioner's sentence. Maddox, supra.

It is necessary to remand this cause for the proper recalculation of Petitioner's presumptive sentence under the 1994 version of the sentencing guidelines, §921.0012, Fla. Stat. (1993); Laws of Fla. Ch. 93-406, §10. Notwithstanding the upward departure sentence, the trial court's use of the improperly calculated scoresheet adversely affected Petitioner's sentence. State v. Rubin, 721 So. 2d 716 (Fla. 1998); Hines v. State, 587 So. 2d 620, 621 (Fla. 2d DCA 1991).

Under the 1994 guidelines scoresheet, not only will 30 points be deleted from Petitioner's guidelines score, but points assessed for Petitioner's prior convictions at level 7 or higher will be reduced significantly. Namely, the addition of 23 sentencing points for Petitioner's prior juvenile adjudication for robbery with a deadly weapon, a level 9 offense, will be reduced to 7.2 sentencing points (R. 32). This will result in an even lower presumptive guidelines sentence. Upon a properly calculated, 1994 guidelines scoresheet, Petitioner's presumptive sentence would be in a range of 83 to 139 months imprisonment.

Additionally, the trial court originally found three (3)

grounds in support of its departure sentence. The Fourth District found only one of these grounds to be valid; Petitioner's non-amenability to rehabilitation due to an escalating pattern of criminal conduct. Hope v. State, supra. Although Petitioner does not concede to the validity of this one surviving departure ground (see Point II, infra), the fact that only one of the trial court's original three grounds was deemed valid, on an erroneous, 1995 guidelines scoresheet, necessitates this cause be remanded to the trial court. Upon remand, the trial court should reconsider whether to impose a guidelines departure on the sole basis of an escalating pattern of criminal conduct in light of a correctly calculated 1994 guidelines scoresheet. See Smith v. State, 678 So. 2d 1374, 1376 (Fla. 4th DCA 1996) (where one or more grounds for guidelines departure sentence deemed invalid, the error regarding the miscalculation of sentencing guidelines scoresheet is not harmless) ; c.f. Rubin v. State, 734 So. 2d 1089 (Fla. 3d DCA 1999) (where three of trial court's multiple grounds for upward departure valid, guidelines scoresheet calculation error was deemed harmless, as it was clear that the trial court would have imposed the departure sentence notwithstanding said error).

ARGUMENT

POINT II

ISSUE PRESENTED:

THE TRIAL COURT'S IMPOSITION OF AN UPWARD DEPARTURE SENTENCE ON THE GROUND OF AN ESCALATING PATTERN OF CRIMINAL CONDUCT WAS NOT JUSTIFIED.

Based upon the decision of the Fourth District Court of Appeal, only one of the three grounds the trial court cited to justify its imposition of a 30 year departure sentence was valid. This was that Petitioner's present crime and his prior record evinced an escalating pattern of criminal conduct. Petitioner submits that this departure ground, as are the other two, is invalid.

The trial court found that Petitioner had engaged in an escalating pattern of criminal conduct, in that he had "engaged in violent felony offenses beginning with simple robbery and leading to the instant offense of Attempted First Degree Murder" (R. 28; ST. 27). §921.001(8), Fla. Stat. (1996). In State v. Darrisaw, 660 So. 2d 269 (Fla. 1995), this Court held that §921.001(8) provides for an upward guidelines departure sentence where the facts indicate, "'an escalating pattern of criminal conduct.'" Id. at 270. The court explained that the escalating pattern may be demonstrated in three ways: (1) a progression from nonviolent to violent crimes; (2) a progression of increasingly violent crimes; and (3) a

pattern of increasingly serious criminal activity. Id. at 271. Based on the trial court's written and oral reasons for departure, it elected to aggravate Petitioner's sentence based exclusively on finding that an escalating pattern existed, evinced by Appellant's progression of increasingly violent crimes (R. 28; ST. 27).

Although a prior juvenile record may be used to show an escalating pattern of criminal activity, see Taylor v. State, 659 So. 2d 1202 (Fla. 3d DCA 1995), the content of Petitioner's Pre-sentence Investigation (hereinafter "PSI") (SR) defies the trial court's findings that there was an escalating pattern of violence. The PSI reflects that two of the three juvenile robbery charges are not equivalent to adult convictions. In Williams v. State, 691 So. 2d 1158 (Fla. 4th DCA 1997), the Fourth District determined that a departure sentence based on an escalating pattern of criminal conduct must be "rooted in convictions or juvenile dispositions." Id. at 1159. The Fourth District went on to hold that, "Hence, mere 'contacts' with the juvenile system will not support a finding of an escalating pattern of criminal conduct." Id. The PSI, which the trial court utilized as its basis to impose the guidelines departure sentence (ST. 26), shows that Petitioner's 1991 "simple robbery" charge did not result in a disposition which was the equivalent of an adult conviction. Puffinberger v. State, 581 So. 2d 897, 898 (Fla. 1991); see also Burke v.

State, 483 So. 2d 404 (Fla. 1985). Rather, it's disposition was entitled "non-judicial," which is neither a delinquency adjudication nor a withhold of delinquency adjudication, and fails to demonstrate any finding of guilt (SR). Williams v. State, supra at 1159; Taylor v. State, supra. Additionally, according to the PSI, there was no juvenile disposition of the 1992 armed robbery charge; rather, it was "held open" with no definitive result or disposition at all (SR). A prior charge which fails to reflect any final disposition cannot be used as a basis to aggravate a sentence. Williams v. State, supra; see also Abouraad v. State, 677 So. 2d 1319, 1321 (Fla. 4th DCA 1996).

The only robbery charge resulting in an judicial disposition and, ostensibly, a finding of guilt was Petitioner's 1993 juvenile delinquency adjudication for robbery with a deadly weapon (SR). This charge resulted in Petitioner's commitment to the Eckerd Youth Development Center (SR). However, this charge, a single juvenile delinquency adjudication for robbery with a deadly weapon, was insufficient upon which to base an escalating pattern of violent departure sentence. A pattern of criminal activity cannot be establish with but a single, prior offense. Williams v. State, supra, at 1160.

Moreover, both robbery with a deadly weapon and attempted first degree murder are both first degree, level

9 felony offenses. §921.0012, Fla. Stat. (1994). Thus, Petitioner's commission of an attempted first degree murder is neither escalating in severity nor violence from his prior juvenile adjudication for robbery with a deadly weapon. The two offenses fail to evince a pattern justifying the trial court's specific ground to aggravate Petitioner's sentence. Consequently, this ground for guidelines departure is invalid. The trial court erred in relying upon it in sentencing Petitioner to 30 years imprisonment and the Fourth District Court of Appeal erred in affirming Petitioner's guidelines departure sentence on this ground. This Court should disapprove of the Fourth District's opinion in the present case, Hope v. State, 736 So. 2d 1256, and vacate the trial court's departure sentence and remand this cause to the Court with instructions to impose a guidelines sentence pursuant to the 1994 sentencing guidelines.

CONCLUSION

Based upon the foregoing Argument and cited authorities, Petitioner requests this Court disapprove of the decision of the Fourth District Court of Appeal and reverse the sentence of the trial court and remand this cause with such directive as may be deemed appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to David M. Schultz, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this _____ day of June, 2000.

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