IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. ROBERT GENE DAVIS, Respondent.	)	CASE NO. 66,081

RESPONDENT'S BRIEF ON THE MERITS

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

TATJANA OSTAPOFF
Assistant Public Defender

Counsel for Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

Respondent was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County, and the Appellant in the District Court of Appeal, Fourth District. The Petitioner was the Prosecution and Appellant in the lower courts. In the brief the parties will be referred to by name.

The symbol "R" will denote the Record on Appeal.

STATEMENT OF CASE AND FACTS

Respondent, Mr. Davis, accepts the Statement of Case and Facts submitted by the State of Florida, but adds that:

The trial court gave as its reasons for departing from the sentencing guidelines that the victim of the kidnapping-robbery, Ms. Elizabeth Rafford, suffered emotional trauma; that Mr. Davis had a prior record of convictions; that Mr. Davis showed no remorse by virtue of his continuing protestations of innocence at sentencing; and that the trial judge believed additional crimes were planned by Mr. Davis against Ms. Rafford. No written statement of reasons for departing from the sentencing guidelines was ever filed.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES. (Restated.)

The recently adopted sentencing guidelines, set forth in Fla. Rules of Criminal Procedure, 3.701, are based on designated sentence ranges to be imposed for various offense categories. In Re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983); § 921.001, Fla. Stat. (1983). The specific intent of the guidelines is to ensure uniformity and to alleviate disparity in the sentencing process, and to prevent overcrowding in our prison system. Section 921.001. In its adoption of the guidelines set forth in Fla.R.Crim.P. 3.701, this Court reiterated the same general concerns, expressed by the legislature when it formed legislation establishing the Sentencing Commission:

> "Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense -- and offender -- related criteria and in defining their relative importance in the sentencing decision."

The elimination of subjective variations in the sentencing process which had heretofore existed geographically -- and indeed from judge-to-judge -- throughout the state, was its goal.

The history of the guidelines clearly reflects their remedial intent. Consequently, they should be accorded a liberal construction so as to advance the remedy provided. Cf. Gaskins v. Mack, 91 Fla. 284, 107 So.918 (1926); Amos v. Conklin, 99 Fla.

206, 126 So.283 (1930). Conversely, exceptions to the guidelines should be narrowly construed. Cf. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957).

The sentencing guidelines embody the following principles under Fla.R.Crim.P. 3.701 (b)(6):

> 6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons. (Emphasis added.)

Any departure from the guideline sentence must be in accordance with Fla.R.Crim.P. 3.701(d)(11):

> 11. Departures from the guideline sentence: Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

As observed by Judge Letts in his opinion in a case decided the same day as the instant case, "The definition of 'clear and convincing reasons' is not given to us in the guidelines and no Florida court has yet attempted to define them." Mischler v. State, __So.2d__ (Fla. 4th DCA, opinion filed October 17, 1984) slip opinion at page 5 (See, Appendix.) However, he found guidance in Slomowitz v. Walker, 429 So.2d 797 (Fla. 4th DCA 1983), where "clear and convincing" evidence was discussed:

> "Our review of the foregoing cases convinces us that a workable definition of clear and convincing evidence must contain both qualitative and quantitative standards. We therefore hold that clear and convincing requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."

This definition, in fact, was used as a predicate for the sentencing guidelines' "clear and convincing reasons for departure." See, Mischler v. State, supra, slip opinion at note 6, page 6, (although the Mischler Court nevertheless purported to find it not "readily adaptable" to the guidelines). Under the Slomowitz framework, then, reasons given by the trial judge for departing from the sentencing guidelines must be credible and concrete, and must produce in the neutral outside observer 'a firm belief or conviction, without hesitancy," that departure is appropriate. It is by this standard that the various reasons for departure given by trial judges around the state must be measured, and this brief will use that standard to analyze the four major reasons given by the trial court in the present case for departing from the guidelines in sentencing Respondent, Mr. Davis: 1) emotional trauma to the victim of the robbery, Elizabeth Rafford; 2) Mr. Davis' prior record; 3) Mrs. Davis' lack of remorse; and 4) the trial court's belief that Mr. Davis planned further violence against Ms. Rafford.

The third and fourth reasons for departure clearly cannot qualify as "clear and convincing" reasons for departure. The trial court's finding that Mr. Davis was not remorseful (R 381) was based entirely on Mr. Davis' statement to the court that he did not commit the kidnapping-robbery. Mr. Davis' profession of innocence, however persuasive or unpersuasive it might be in light of the jury's verdict, cannot be considered as grounds to believe that he had no remorse. Mr. Davis certainly expressed himself remorseful for the offense he admitted committing, the uttering of a forged instrument (R 371,374). And in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983), this Court unequivocally held that a defendant's continuing assertion of innocence even after conviction cannot be used as an indication of lack of remorse to aggravate the sentence. As recognized by the Fourth District Court of Appeal in the present case below, consideration of Mr. Davis' assertion of innocence at his sentencing as a basis for departing from the sentencing guidelines was totally improper.

The trial court's statement that it was aggravating Mr. Davis' sentences because the judge believed Mr. Davis intended some other, more violent crime against Ms. Rafford than simply taking her purse (R 368-369) must likewise fall. Speculation like this as to other possible uncharged offenses is expressly prohibited by the guidelines. Thus, Fla.R.Crim.P. 3.710(d)(11) provides:

> "Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include

> factors relating to the instant offenses for which convictions have not been obtained. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701,3.988 - Sentencing Guidelines 451 So.2d 824 (Fla. 1984).

And the Committee Note [1] to that rule unambiguiously states:

> "The court is prohibited from considering offenses for which the offender has not been convicted."

In the present case, not only was there a complete absence of "clear and convincing" evidence, that is, credible and concrete evidence of additional offenses intended by Mr. Davis, but indulging in such speculation runs completely contrary to the principles governing the sentencing guidelines. In Lindsey v. State __So.2d__ (Fla.2d DCA, opinion filed August 1, 1984) [9 F.L.W. 1688], the appellate court rejected the trial court's speculation, as a reason for departing from the guidelines, that the defendant, a drug dealer, "could have" been convicted of ten or twenty counts of drug dealing. Such

> "Speculation as to what the appellant might have done in the future is not a clear and convincing reason for departure from the guidelines..."

Moreover, the trial judge's consideration of what it believed Ms. Rafford's assailant might have been attempting, a crime with which the state did not charge him, is subject to objections similar to those which prevent consideration of an offense for which a defendant has been acquitted.

---

1 The Committee Notes have been adopted by this Court as "part of these rules" relating to sentencing guidelines. The Florida Bar, supra.

> "Secondly, because Appellant was charged with and tried for robbery, the jury's verdict finding him guilty only of grand larceny constituted an implicit finding that Appellant did not accomplish his theft 'by force, violence, assault or putting in fear,'the elemental difference between theft and robbery. Constitutionally, a defendant should not be punished (sentenced) for conduct of which he has been acquitted. Further, to depart from the recommended guideline sentence in this case on the basis that the defendant used or threatened force in accomplishing the theft for which he was being sentenced would be to consider 'factors relating to the instant offenses for which convictions have not been obtained.' (Rule 3.701 (d)(11) as 'revamped' May 8, 1984) a reason for departure expressly prohibited, and would constitute a 'real offense' sentencing. Fletcher v. State ___So.2d___ (Fla. 5th DCA, opinion filed October 11, 1984) [9 F.L.W. 2149] (footnotes omitted).

See also, Owen v. State, 441 So.2d 111 (Fla. 3rd DCA 1983). In short, the Fourth District Court of Appeal properly concluded that the trial court below erred in considering what it thought might have happened as a reason for departing from the guidelines.

Up to this point, then, the Fourth District Court of Appeal correctly held two of the four reasons stated by the trial judge for departure as invalid. Moreover, the state has not challenged these findings in its initial brief on the merits to this Court. As to the first and second grounds for departure, however, the lower appellate court held that no error was committed by the trial court. In this regard, the district court of appeal was mistaken. Thus, the fact that Elizabeth Rafford suffered "substantial psychological or emotional trauma" during the

incident (R 438, paragraph 5) is a circumstance which has already been taken into account in setting up the sentencing guide for the offense of conviction. After all,

> "Weighting the factors is designed to add a measure of uniformity to the sentencing process and thereby eliminate unwarranted sentences variation. The weights are unique to each offense category and relate only to those offenses contained within that category." Fla. R.C.P. 3.710 (II: Guidelines Scoresheet, introduction) (emphasis added).

The offense of kidnapping--and, indeed, robbery--is a necessarily personal, always potentially violent confrontation between the violator and the victim. Absent a victim's unnaturally stoi cial character, any such confrontation will cause "substantial psychological or emotional trauma." That is in the very nature of the offenses and has already been included in the weighing of the scored factors under the guidelines. See also, State v. Hagen, 317 N.W.2d 701, (Minn. 1982).[2] It is important to emphasize that the sentencing guidelines are designed to be as objective as possible:

> "Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense -- and offender -- related criteria and in defining their relative importance in the sentencing decision." Fla.R.Crim.P. 3.701(b).

---

[2] Minnesota law is persuasive authority in this area, since Minnesota is one of only three states using these guidelines (Pennsylvania and Florida are the others), and employs a burden analogous to Florida's "clear and convincing reasons" for departing from the recommended sentence.

An assessment of the "emotional trauma" suffered by any particular victim of a crime will necessarily be unquantifiable, and determinable only through guesswork on the part of the sentencing court.

Additionally, since "psychological" or "emotional" trauma is present to some extent in virtually every felony, from the dismay of the homeowner who comes home to find his house burglarized, to the fear of the robbery victim, allowing this kind of injury to be used as a reason to depart from the sentencing guidelines would do no less than to destroy the very premises on which the guidelines are founded. Since any case could be subject to a sentence outside the guidelines by the simple expedient of a trial judge's finding that emotional trauma was inflicted, the sentencing process would revert to that purely discretionary function which existed pre-guidelines.

Finally, and perhaps most fundamentally, the guidelines provide that "the primary purpose of sentencing is to punish the offender." Fla.R.Crim.P. 3.710(b)(2). And

> 3. "The penalty imposed should be commensurate with the length and severity of the convicted offense and the circumstances surrounding the offense.
>
> 4. The severity of the sanction should increase with the length and nature of the offender's criminal history." Fla.R.Crim.P. 3.710(b).

Thus, the focus of the guidelines is, as it properly should be, on the offender: What he has intentionally done, both in the past as reflected by his record and in the offense for which he

is being sentenced. Where an offender has been particularly brutal in committing an offense or where a class of persons with special weaknesses, such as the elderly, has been intentionally (rather than fortuitously) preyed upon, where, in sum, a conscious decision has been made on the part of the offender to act in an especially vile or ruthless manner, then unquestionably the trial judge is permitted to consider these "circumstances surrounding the offense" as a reason to depart from the guidelines sentence. Where, on the other hand, the facts of the case reflect excerbating circumstances about which the offender had no control or which he had no conscious intent to effect, apart from the general intent present when any violent felony is committed, then it can serve no proper sentencing function to impose a higher sentence on this basis. It cannot be fair to penalize one defendant at sentencing because his victim, an emotional basket case before the offense, is now an emotional wreck, and to regard another defendant because the victim in the case has magnanimously forgiven him and made every effort, with some success, to overcome the fear and anger resulting from having been victimized. The disposition of a defendant's case should not turn on the fact that one victim is psychologically secure and another one on psychologically shaky ground prior to the offense, factors which the defendant has no means of controlling or even knowing beforehand. The effect would be analogous to increasing punishment if the victim were wealthy, while de-

creasing the sentence if the victim were poor: The crime is the same no matter what the financial state of the victim, and should be equally punished.

As to the last reason given by the trial court for departure in the present case, reliance upon the fact that Mr. Davis "has served prior prison terms and does not appear to be capable of being rehabilitated" (R 439, paragraph 3) is also not an appropriate aggravating factor. The offender's prior record has already been taken into account in he scoring of his sentence, under an explicit category of its own. As observed in State v. Magnan, 328 N.W. 2d 147, 149-150 (Minn. 1963):

> Generally the sentencing court cannot rely on a defendant's criminal history as a ground for departure. The Sentencing Guidelines take one's history into account in determining whether or not one has a criminal history score and, if so, what the score should be. Here defendant's criminal history was already taken into account in determining his criminal history score and there is not justification for concluding that a quantitative analysis of the history justifies using it as a ground for departure.

State v. Brusver, 327 N.W. 2d 591 (Minn. 1982); State v. Barnes, 313 N.,W. 2d 1 (Minn. 1981). Furthermore, in State v. Hagen, supra, at 703, the Minnesota High Court also categorically rejected a trial judge's consideration of a defendant's likelihood of returning to criminal conduct as an aggravating factor. The Court reasoned:

> Such a factor potentially could be subject to serious abuse and logically could be used to justify indefinite confinement, something which is not permitted by law for any offense other than first-degree murder.

The courts of this State have applied similar analysis in refusing to countenance, for example, the Parole Commission's utilization of an element included within the crime for which sentence was imposed, which consequently formed the basis for computing the offender's presumptive parole relese date, as a reason for aggravating that date. Mattingly v. Florida Parole and Probation Commission, 417 So.2d 1163 (Fla. 1st DCA 1982); Jacobson v. Florida Parole and Probation Commission, 407 So.2d 611 (Fla. 1st DCA 1981). Patently, if the same factor is used to depart from a guideline sentence as was used to set the guideline sentence in the first place, the exercise of setting a guideline has been rendered nugatory: why bother to carefully calculate a sentencing range based on specified factors, when any trial judge can then recalculate the entire equation based on exactly the same input? The result of such a process will again be to nullify the fundamental purpose of the guidelines, "to eliminate unwarranted variation in the sentencing process." As observed by Judge Sharp in her dissent in Hendrix v. State, 455 so.2d 449, 451 (Fla. 5th DCA 1984):

> It appears to me that the design of the guidelines implicitly prohibits the second use of a defendant's prior record to further enhance his punishment. If uniformity in sentencing is to be achieved through use of the guidelines, Fla. R.Crim.P. 3.701(b), its mandates and exclusions should control the whole sentencing process. See Harvey v. State, [450 So.2d 926 (Fla. 4th DCA) 1984)].
>
> The trial judge in this case thought he presumptive sentence was too light a punishment for this crime and this defendant with his prior record. I agree. However, the degree of punishment afforded by the guidelines, or lack thereof, should not be grounds for enhancement.

> The basic problem is the generally light punishments programmed as presumptively correct in the guidelines.
>
> The legislature can remedy this problem. However, if in the meantime the courts render the guidelines meaningless by allowing departures in violation of the guidelines rules and mandates, there will be nothing left to remedy. Sentencing guidelines in Florida will become an interesting but failed social experiment (footnotes omitted.)

The State's argument that the sentencing guidelines do not expressly exclude consideration of prior record as a reason for departure, see also, Hendrix v. State, supra (majority opinion); Fleming v. State, ___So.2d___ (Fla. 2d DCA, opinion filed October 5, 1984) [9 F.L.W. 2118] is, in all due respect, specious. The guidelines intentionally do not specify what may be used as a reason for departure, in order to allow maximum flexibility to the sentencing judge, See, Higgs v. State, ___So.2d___ (Fla. 5th DCA, opinion filed September 6, 1984) [9 F.L.W. 1895 at 1896 and fn. 3] so long as the factors employed are "consistent and not in conflict with the Statement of Purpose" Committee Note, Fla.R.Cr.P. 3.710 (d) (11). But this circumscribed freedom does not mean that all common sense and rationality is cast aside. Surely, nothing could be further from the avowed purpose of the sentencing guidelines than to allow their complete circumvention by authorizing trial courts to, in effect, ignore their carefully determined conclusions. Perhaps some of the intermediate appellate courts of this State have forgotten, as have the trial courts,[3]

---

[3] Precisely this misconception was indulged by the trial judge in the present case, who imposed a mandatory three year minimum and

> "The sentencing guidelines were not promulgated for the purpose of benefiting criminal defendants, but to promote uniformity in the punishment meted out to those convicted of the same offense, whose prior conviction records and other relevant factors are comparable. The point apparently disregarded by many is that those defendants choosing to be sentenced in accordance with the sentencing guidelines are required to serve the entire term of their sentences, reduced only by gain time, and are not eligible for parole. On the other hand, those who are not sentenced under the guidelines, although their sentences may initially be for a longer term, will be eligible for parole and may in fact receive an earlier relea se date than if sentenced under the guidelines. Knight v. State, 455 So.2d 457, 458 (Fla. 1st DCA 1984).

If the guidelines are to survive as originally conceived in this State, they must be interpreted in a manner consistent with their purpose, something which the district courts of appeal have so far to a large extent refused to do. Judge Letts, in his opinion, in the present case, confesses himself "troubled" by the trial court's use of Ms. Rafford's emotional trauma and Mr. Davis' prior convictions as reasons to depart from the guidelines. By the Fourth District Court of Appeal's certification of a question in the present case, a vehicle has been given for this Court, the highest in the State, to "give guidelines for the Guidelines." Davis v. State, supra, slip opinion at 8. By

---

retained jurisdiction over one-third of Mr. Davis' sentence because "it looks like you are eligible for parole" (R 387). Because Mr. Davis' sentence under the guidelines is to the time he will actually spend in prison, Fla. R. Cr. P. 3.710 (b) (5), this case must, in any event, be remanded for reconsideration in light of the real effect of the sentence, which was totally misconceived by the trial judge. This was fundamental sentencing error. State v. Rhoden, 448 So.2d 1013 (Fla. 1984); Brumley v. State, 455 So.2d 1096 (Fla. 5th DCa 1984).

ensuring that only truly "clear and convincing reasons" are upheld to justify a departure from the guidelines sentence, this Court will go a long way to both reducing the number of guidelines appeals as trial and appellate courts come to recognize the proper and necessary limits to departure and to give life to the beneficial goal of the guidelines, namely, the appearance and actuality of fair and uniform sentencing throughout this State.

POINT II

TRIAL COURT ERRED IN DEPRIVING FROM THE SENTENCING GUIDELINES WITHOUT STATING ITS JUSTIFICATION THEREFORE IN WRITING. (Restated)

Florida Rules of Criminal Procedure, 3.701 (d)(11) requires, inter alia:

> "Any sentence outside the guidelines must accompanied by a written statement delineating the reasons for the departure."

The committee note to this rule explains:

> "The written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public, of the reasons for departure. (Emphasis added.)

Thus, the requirement that reasons for departing from the guidelines be articulated in writing serves not only to perfect a record for appeal, but also to provide a public document from which those not immediate parties to the proceedings can know tht sentencing in this State is consistent, or that if it is not, that there are "clear and convincing reasons" therefor, and what those reasons are.

It has been held that the requirement of a written statement of reasons for departing from the sentencing guidelines is met where the trial judge makes oral findings which are subsequently transcribed as part of an appeal. Harvey v. State, 450 So.2d 916 (Fla. 4th DCA 1984). While this procedure may be adequate to give the parties involved notice of why a particular sentence is imposed in their own case, and may also meet the needs of an appellate court which reviews the case if an appeal is

entered,[4] it clearly cannot satisfy the rule's intent that the public understand and be made aware of the operation of the sentencing guidelines in this State. The requirement for a written statement in sentencing guidelines cases thus has a very different rationale than that in other situation where a written sentencing order is required, one which renders the "oral statement transcribed" alternative inappropriate. In addition, the Harvey Court did did not have the benefit of State v. Rhoden, 448 So.2d 1013 (Fla. 1984), In Rhoden, this Court held it fundamental error for a trial judge to sentence a juvenile as an adult without complying with Fla. Stat. § 39.111, including its requirement that the judge state, in writing, his reasons for not employing juvenile sanctions.

---

[4] However, the instant case demonstrates one weakness of not requiring written statement for Appellate purposes:

> "a judge's oral statements made at sentencing may be rambling, poorly expressed and may require extrapolation and reconstruction by the appellate court to be substainable as 'clear and convincing.' This makes appellate review difficult, and presents a quandary when some of the reasons given are possibly not convincing. "Keeley v. State, (Fla. 5th DCA opinion filed October 11, 1984) [9 F.L.W. 2190] (Judge Sharp, concurring specially).

Mr. Davis therefore respectfully suggests that this Court put teeth into the requirement for a written statement justifying deprture by remanding this cause for the trial court's failure to enter a written order below. Jackson v. State, ___So.2d___ (Fla. 1st DCA, opinion filed August 6, 1984) [9 F.L.W. 1703]; Roux v. State, ___So.2d___ (Fla. 1st DCA opinion filed August 14, 1984) [9 F.L.W. 1786].

POINT III

WHERE CERTAIN OF THE REASONS GIVEN BY THE TRIAL COURT FOR DEPARTURE FROM THE SENTENCING GUIDELINES ARE NOT "CLEAR AND CONVINCING", THE SENTENCE MUST BE REMANDED FOR REDETERMINATION WITHOUT CONSIDERATION OF THE IMPROPER REASONS.

In death penalty cases, this Court has repeatedly remanded for reconsideration of the sentence where aggravating circumstances relied on by the trial judge for imposition of the death penalty have been reversed and at least one mitigating factor existed, even though other aggravating factors are left standing. Elledge v. State, 346 So.2d 998 (Fla. 1977). And on a less extreme level, a trial court's determination that a defendant has violated his probation will be reversed where a finding that he committed a substantive violation of probation has been reversed, even though technical violations in themselves sufficient to justify revocation remain unchallenged. E.g. Jess v. State, 384 So.2d 328 (Fla. 3rd DCA 1980).

The basis for these decisions is exactly the same. In Elledge, this Court queried:

> "Would the result of the weighing process [leading to imposition of the death sentence] by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial..." 346 So.2d at 1003.

In Jess v. State, the appellate court likewise confessed itself in a quandary as to the trial judge's response had he considered only the legally established violations of probation:

> "We do not know, however, whether the trial judge would have revoked the probation or imposed the same sentence on just that [technical] ground, without consideration of the [unproven] burglary. We therefore think it appropriate to remand the cause so that the lower court may now make those determinations." 384 So.2d at 329.

The decision as to what sentence to impose is one with crucial impact on a defendant. Because the trial judge has enormous discretion as to the amount of time to impose, within legal limits, and some discretion as to whether to depart from the sentencing guidelines, it is essential that this discretion be exercised in an informed and proper manner, with consideration only of those factors which are proper. Because it is almost always difficult if not impossible to determine what weight has been given by the trial judge in his sentencing decision to any particular factor, it is imperative that a finding that certain factors considered were improper result in remand for reconsideration of the sentence in light of the correct facts. This remedy has uniformly been allowed in sentencing situations. See, e.g., McEachern v. State, 388 So.2d 244(Fla. 5th DCA 1980) [defendant penalized for going to trial, case remanded for reconsideration of sentence]; Southall v. State, 353 So.2d 660 (Fla. 2d DCA 1977) [defendant's previous conviction set aside, case remanded for reconsideration of sentence]; Hicks v. State, 336 So.2d 1244 (Fla. 4th DCA 1976) [mistake as to extent of prior record, case remanded for reconsideration of sentence].

In the instant cases, the Fourth District Court of Appeal remanded an order for the trial court to reconsider its sentence

in light of the incorrectness of certain of its reasons for departing from the guidelines sentence. See also, Young v. State, __So.2d__ (Fla. 1st DCA, opinion filed August 24, 1984) [9 F.L.W. 1847]. This result was required in the first instance because the trial judge erroneously believed that Mr. Davis was subject to parole, a misconception which clearly would have had an impact on the length of the term imposed. See, Argument, supra, Point I at note4. But more fundamentally, the appellate court below recognized that many factors go into the sentencing decision to affect both whether a departure is made and, crucially, the extent of that departure. Assuming that the trial judge will impose exactly the same sentence even after being advised that his reasons for setting the original term were improper assumes a cynicism on the part of the trial bench which is surely unwarranted. This is particularly true since, unlike in a death penalty case where no mitigating circumstances exist, or a probation revocation where a finding of one technical violation is reversed but several other technical violations remain validly proven, there is in a sentencing guideline case no presumption in favor of departure from the guidelines to a specified degree. Rather, it is the propriety of the guideline sentence which is presumed, Fla.R.Crim.P. 3.710(d)(11).

Consequently, it is appropriate that the instant causes be remanded for resentencing, even should some of the reasons for departure from the guidelines be held proper by this Court.

CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

TATJANA OSTAPOFF
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable JOAN FOWLER ROSSIN, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 10th day of December, 1984.

Of Counsel