IN THE SUPREME COURT OF FLORIDA

WILLIAM BROOKS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO.: 66,137

DISTRICT COURT OF APPEAL
First District - Nos: AW-329
AW-337

INITIAL BRIEF OF APPELLANT WILLIAM BROOKS

On Appeal from the First District Court of Appeal, Certified Question of Great Public Importance

L. Sanford Selvey, II
Attorney at Law
906 Thomasville Road
Tallahassee, FL 32303
(904) 222-7017

Attorney for Appellant

TABLE OF CASES AND AUTHORITIES

CASES

Other Authorities

PRELIMINARY STATEMENT

Appellant, William Brooks, was the defendant at trial and will be referred to in this brief as the defendant or by his proper name. Appellee, the State of Florida was the prosecution at the trial level and will be referred to herein as the State. The record consists of one bound volume and will be referred to by use of the symbol "R". All emphasis is supplied unless the contrary is indicated.

IN THE SUPREME COURT OF FLORIDA

WILLIAM BROOKS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO.: 66,137

DISTRICT COURT OF APPEAL
First District -No : AW-329

STATEMENT OF THE FACTS

L. SANFORD SELVEY, II
ATtorney at Law
906 Thomasville Road
Tallahassee, FL 32303
(904) 222-7017

STATEMENT OF THE FACTS

On September 1, 1983, William Brooks and Joseph Henry Ford were charged by information with the armed robbery of Leo Allen and Rhonda Carlson. (R-1).

On October 4, 1983 William Brooks proceeded to trial without Joseph Ford before Judge J. Lewis Hall, Jr. and a jury. The following is a summary of the evidence presented at trial.

Rhonda Carlson testified that she was employed at a business know as Allen's Kwik-Pik (sic), located on Miccousukee Road in Tallahassee, Leon County, Florida, on November 29, 1982. (R-108). The store was empty when two men came up to the counter. The other went to the middle of the room. (R-110). both were black males. (R-111-112). A third person came in afterwards with a gun and said this was a holdup. (R-113). The gunman was also a black male. (R-114). Once the gun was produced, the man who brought the beer to the counter left the counter to act as a lookout. (R-115). The other black male without a gun came behind the counter, took money out of the cash register and out from underneath the cash register drawer, and then went underneath the counter looking through "some bags and stuff". (R-116). On a shelf located under the counter was a cigar box in which money was kept. (R-117-119). That cigar box was located in an area that was not possible for customers to reach from their

side of the counter (R-119). When the robbers got ready to leave they told Mr. Allen and Ms. Carlson to get on the floor, which they did, and robbers left (R-120). Ms. Carlson testified that she let the robbers have the money because she was frightened by the gun (R-121). The police were called soon after the robbers left (R-121). She further testified that the cigar box under the counter usually contained paper money, it was not kept within reach of the customers and the owner of the store (Mr. Allen) would not let anyone except store employees behind the counter where the cigar box was kept. (R-127-128). Ms. Carlson stated that William Brooks looked similar to the man who came behind the counter the night of the robbery. (R-128-129).

On cross-examination, Ms. Carlson testified that she did not know where the cigar box was kept prior to her beginning to work at the store two and one-half months earlier (R-131). She also stated that she saw the robber touch the cigar box with the money in it (R-133).

Ray Lambert of the Tallahassee Police Department testified that he was the first officer to arrive at the store following the robbery (R-135-136). He turned the store over to Doyle Woods to process the scene (R-137).

After a lunch recess the defense attorney moved to disqualify several witnesses from testifying because they violated the rule of sequestration (R-138-139). The motion was denied as was the defendant's motion for a mistrial (R-162).

Doyle Woods of the Tallahassee Police Department testified that he is a crime scene technician (R-164). On November 29, 1982 he responded to the scene of an armed robbery and processed several areas of the store for fingerprints. (R-163, 165). Among the items processed for fingerprints was a cigar box located on a shelf under the counter (R-166-167). He developed a latent print from the lid of that cigar box (R-166).

On cross-examination Mr. Woods testified that he developed several other latent prints from various surfaces around the store (R-169-170). He also testified that he could not tell how long a fingerprint had been on a surface by looking at it (R-170-171), or how long the latent print developed on the cigar box had been there (R-170-171).

Melvin Terry of the Leon County Sheriff's Department testified that he arrested William Brooks on June 15, 1983 and as part of the normal booking procedures suspects who are booked into the Leon County Jail are fingerprinted (R-173-174).

William Gunter of the Leon County Sheriff's Department testified that he took the inked fingerprints of William Brooks on September 29, 1983 (R-181-182). He compared those inked fingerprints with the latent prints he obtained from Doyle Woods and is of the opinion that the latent prints belonged to William Brooks (R-182-184).

On cross-examination, Mr. Gunter testified that there was no way of telling how long a latent lift would stay

on a cigar box top (R-189). He further testified that he examined other latent prints found on the cash drawer and the cooler but was unable to identify them as Brooks' fingerprints (R-190-191).

Jean Marks Testified that she was the assistant manager of the store that was robbed (R-194-195). She testified that William Brooks has never been an employee of the store (R-195) and that the cigar box under the counter has never been in a position within the store which was within the reach of the public (R-195-196).

The State rested its case (R-199), the defense moved for a directed judgment of acquittal (R-200), the motion was denied (R-201) and the defense rested without calling any witnesses (R-201-202).

The jury returned after its deliberations with a verdict of guilty as charged of armed robbery (R-238-239, 245).

Motions for judgment of acquittal and for a new trial were filed (R-50, 51) and denied (R-80).

On December 7, 1983 the defendant elected to be sentenced under the sentencing guidelines (R-82) pursuant to which the recommended sentence range was 3½ to 4½ years. (R-56). Judge J. Lewis Hall, Jr., sentenced the defendant to the Department of Corrections for a term of 20 years (54, 84). The stated reasons for the departure from the recommended guideline range were as follows:

"First, that the commission of the offense did involve multiple victims.

Secondly, there has been no pretense of moral or legal justification for the commission of the offense.

Third, the Court feels and is of the view that this Defendant, is in need of correctional rehabilitative treatment that can best be provided by commitment to a penal facility.

Next, that he is engaged in a violent pattern of conduct which indicates a serious danger to society.

Next, the sentence is necessary to deter others from the commission of similar offenses.

Next, the emotional trauma suffered by these victims as well as their physical trauma was considered by the Court.

Next, that there was participation with others in the commission of the offense.

It's the final view of the Court that a lesser sentence is not commensurate with the seriousness of the Defendant's crime." (R-84-85-, 57).

The Defendant objected to both the form and substance of the reasons given for going outside the guidelines (R-86).

An Amended Notice of Appeal was timely filed on December 13, 1983 (R-76).

IN THE SUPREME COURT OF FLORIDA

WILLIAM BROOKS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO.: 66,137

DISTRICT COURT OF APPEAL
First District - No: AW-337

STATEMENT OF THE FACTS

L. SANFORD SELVEY, II
Attorney at Law
906 Thoamsville Road
Tallahassee, FL 32303
(904) 222-7017

STATEMENT OF THE FACTS

On July 15, 1983, William Brooks and Joseph Ford were charged by information with the December 23, 1982 armed robbery of Barri Fullerton (R-1). On September 13, 1983, the state filed its Notice of Intent to Rely on Similar Fact Evidence relating to several other armed robberies Brooks was charged with, including the November 29, 1982 armed robbery of Leo Allen and Rhonda Carlson. (R-15-16). On September 25, 1984 Brooks filed a Motion in Limine seeking to "prohibit the State from introducing evidence of any collateral crime in its evidence in the trial of this cause". (R-25-26). The defendant also filed a Motion for Brady Material which was granted. (R-10-12).

On November 1, 1983, William Brooks proceeded to trial without Joseph Ford before Circuit Judge J. Lewis Hall, Jr., and a jury. The following is a summary of the evidence presented at trial:

Barri Fullerton testified that she worked at business called the Yogurt Pump in December of 1982. (R-99). At approximately 8:00 p.m. she was alone in the store and there were no other customers present when three people came in the front door. (R-100). All were black males. (R-101). One asked to use the restroom and went to the back hall where it was located. He was described as about five-ten, approximately 170 pounds, with fairly broad shoulders. (R101). [Later identified as Brooks (R-108)]. Another black male (apparently Ford) asked

for some yogurt. She fixed it and when she opened the cash register to make change the first individual (apparently Brooks) came up behind her wearing gloves (R-102). He took the drawer and put it on the floor as the third black male (apparently Frazier) produced a gun. (R-102). Fullerton was then escorted to the cooler by the one who produced the gun (Frazier). (R-103, 106-107). Fullerton then identified Brooks as looking "very similar to the man that was in the restaurant that night". (R-108).

The defense moved for a mistrial based on a violation of Brady v. Maryland, (R-110). The grounds for the motion were that the State failed to produce line-up sheets signed by Fullerton indicating that she viewed a line-up containing William Brooks and did not identify him as one of the robbers. (R-110-112). The State agreed that there was a line-up with William Brooks in it and the witness did not pick him out. (R-122). The Court denied the motion. (R-113).

On cross-examination, Fullerton testified that suspect "C" (apparently Brooks) had on brown work golves and that she did not see him go through a pantry or storage area behind the counter (R-116). She also reiterated that Brooks only looked similar to the man who robbed her and she could not positively say he was the man who robbed her. (R-117). She recalled going to a line-up at the Leon County Jail where she could not pick out anyone and she signed a line-up sheet indicating she did not pick out

anyone. (R-118-121).

Louis Donaldson testified that he was employed by the Tallahassee Police Department and arrived at The Yogurt Pump at 8:09 p.m. and met Barri Fullerton. (R-124). He secured the scene for the crime lab people. (R-125). He also discovered that the back door was open. (R-126).

The trial court then took up the Defendant's Motion in Limine to prohibit the introduction of similar fact evidence. (R-128-136). The evidence was being submitted on this issue of the identity of Brooks as one of the three black males who robbed Barri Fullerton (R-129, 130). The Defendant argued:

> "Your Honor, I think, and I would submit to the Court that what the witnesses are going to show is that we have two different robberies that are committed in a similar fashion, but there are a number of dissimilarities between the method by which both of them were committed . . .
>
> The only real similarity between the two offenses is that the same three people are supposedly involved in each. There is absolutely nothing particularly unique or unusual to distinguish either one of these robberies from virtuously any other three-person robbery, other than the fact that it involves the same three people in both of them.
>
> Because of that and because of the Supreme Court decision in Drake versus State and the various District Court of Appeals decisions in Drayton versus State, . . ., Cramer versus State, . . ., Beasley versus State,. . ., McCullough versus State, . . ., Henry versus State,. . ., Norris versus State, . . ., and others, all indicate that there must be something particularly unique or unusual about the two crimes. And in this case, I don't believe that uniqueness or that particular uniqueness has been shown in this case.

> As the Court has already indicated, I would request that my objection be a continuing one throughout the course of this trial and my Motion for a mistrial likewise be considered a continuous motion." (R-133-135).

The Court denied the motion and ruled that the evidence would be admitted. (R-128-132, 136).

Deputy Ralph Johnson testified that he responded to The Yogurt Pump as the crime scene investigator and was unable to locate any latent fingerprints which he could read. (R-136-138).

Vance Frazier testified that he currently resided in Florida State Prison and that he knew William Brooks and identified him. (R-139-140-). He also knows Joseph Henry Ford. (R-140). Frazier was serving a three year sentence for a different armed robbery, (R-140), pursuant to an agreement he reached with the State Attorney's Office. (R-141). That agreement called for him to testify against his co-defendant (Brooks) and he would receive three years on one armed robbery and immunity for all other charges he testified about. (R-141). He further indicated he participated in the armed robbery of The Yogurt Pump with both Brooks and Ford December 23, 1982. (R-142). Earlier on the day of the robbery, while at Ford's apartment, Ford came up with the idea of robbing the Yogurt Pump. (R-143-144). They used Brook's girlfriend's car, (R-144-145) and parked it near the Yogurt Pump on a hill. (R-145-146). Willaim Brooks gave Frazier the gun they would use at Ford's apartment. (R-146). Once inside the store

Brooks asked to use the restroom and went to check the back door. (R-148). Ford asked the young lady for some yogurt. (R-148). Frazier produced the gun after the cash register was opened. (R-149). Brooks then came back up front behind the counter and got money from the cash register and a pocketbook. (R-149). Frazier then told the girl to get into the cooler which she did and everyone went out the back door. (R-150-151). They ran two blocks to the car, drove to Brooks' girlfriend's apartment where the money was split up and everyone was driven home. (R-152-153).

Frazier further testified about an armed robbery at Allen's Quick Pic on Miccousukee Road which occurred on November 29, 1982, with Brooks and Ford. (R-154). On that occasion they drove Ford's car and it was Ford's idea to commit this robbery. (R-155). Brooks and Frazier went in first and Ford waited outside a while before coming in. (R-155). The gun Frazier used he had received from Brooks. (R-156). Brooks went to the cooler and brought some beer up to the cash register. (R-156). Once the register was opened Brooks went and got the money out of the register and out of a cigar box which was behind the counter on a shelf. (R-157). Brooks was not wearing any gloves during this robbery. (R-157). While the robbery was going on, Ford stayed outside and came in later. (R-157-158-). The employees of the store were then told to lay down on the floor while the robbers left the store.

(R-158-159). The money was split up and the gun was given back to Brooks. (R-159).

On cross-examination Frazier testified he knew that people convicted on armed robbery usually get anywhere from 15 to 25 to life in Leon County. (R-162-163). He further testified that he committed at lease six armed robberies plus the one he pled to and he could have received seven life sentences. (R-163-165). One of the cases he was granted immunity on was the robbery at the Yogurt Pump. (R-165-166). He felt Brooks was pretty sorry because Brooks didn't help him out and he was looking for a way to get back at Brooks as well as save his own skin. (R-166-167). Frazier also stated he has been convicted of a felony three times. He testified that in Allen's Quick Pic case Ford was the lookout while in the instant cause he was not. (R-176).

Rhonda Carlson testified that on November 29, 1982, she was employed at Allen's Quick Pic on Miccosukee Road when a robbery occurred. (R-179-180). Two robbers came in, one brought some beer to the counter, the other walked around and approached the counter with the first one. (R-181). Ultimately a third person came in. (R-181). A gun was produced by one man (apparently Frazier) one man went to act as a lookout (apparently Ford) and the third went behind the counter and got the money out of the register and a (cigar) box underneath the counter. (R-182-183). Carlson pointed out Brooks as looking similar to one of the robbers but she could not be certain. (R-185-186). Carlson and Mr. Allen were then told to lie on the floor and the robbers left. (R-186).

She further testified that she felt the robbers used a real gun and they parted with the money out of fear of being shot. (R-187-188).

On cross-examination Carlson testified that she doesn't know where the cigar box the robber handled had been nor was she positive about her identifying Brooks as one of the robbers. (R-189-190).

Deputy John Livings testified that he took the known inked fingerprints of William Brooks on June 16, 1983. (R-190-194).

Doyle Woods, Jr., of the Tallahassee Police Department testified that he went to Allen's Quick Pic on November 29, 1983, and processed that establishment for fingerprints. (R-199). He developed one latent print from a cigar box lid which was located on a shelf underneath the counter, (an area not accessible to a customer). (R-199-200). He compared that latent print with the inked fingerprint card recorded by John Livings and they matched. (R-203).

On cross-examination Mr. Woods testified that he didn't know when that particular fingerprint was placed on the cigar box or now long it would stay there. (R-204-205).

The State rested its case. (R-206).

The Defense renewed its Motion for Mistrial based on the State's violation of Brady v. Maryland which was denied. (R-206-209). The defense moved for a mistrial on the basis of a violation of the Williams rule for the introduciton of evidence

of a separate and unrelated criminal episode. (R-209-211). That motion was denied. (R-211).

The defense rested without putting on any evidence, (R-211) and reviewed all motions. (R-211). All motions were denied. (R-211). The jury subsequently returned with a verdict of guilty of armed robbery. (R-264, 29).

Motions for Judgment of Acquittal and for New trial were timely filed (R-33-35) and denied. (R-65).

The Defendant was adjudicated guilty of armed robbery and sentenced to twenty years in the Department of Corrections, a sentence which departed from the recommended guideline sentence of 3½ to 4½ years. (R-69). The reasons given for the departure were as follows:

"First, that the commission of the offense did involve multiple victims.

Secondly, there has been no pretense of moral or legal justification for the commission of the offense.

Third, the Court feels and is of the view that this Defendant is in need of correctional rehabilitative treatment that can best be provided by commitment to a penal facility.

Next, That he is engaged in a violent pattern of conduct which indicates a serious danger to society.

Next, the sentence is necessary to deter others from the commission of similar offenses.

Next, The emotional trauma suffered by these victims as well as their physical trauma was considered by the Court.

Next, that there was participation with others in the commission of the offense.

It's the final view of the Court that a lesser sentence is not commensurate with the seriousness of the Defendant's crime." (R-42, 69-70).

The defendant objected to both the form and substance of the reasons given for going outside the guidelines. (R-71-72).

A Notice of Appeal was timely filed in the 1st District Court of Appeal.

STATEMENT OF THE CASE

The First District Court of Appeal filed its opinion in this case on October 9, 1984 and affirmed the defendant's conviction. However, the Court of Appeal did certify the following question deemed to be one of great public importance:

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER, FLA.R.CR.P. 3.701 IN MAKING ITS DECISIONS TO DEPART FROM THE SENTENCING GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING.

POINT I

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CR.P. 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING.

See also Young v. State, 445 So. 2d 551 (Fla. First District 1984).

In the instant case the trial court departed from the recommended guideline which called for a 3½ to 4½ year sentence and imposed the sentence of 20 years in the Department of Corrections. The trial court cited the following reasons for its departure:

"First, that the commission of the offense did involve multiple victims.

Secondly, there has been no pretense of moral or legal justification for the commission of the offense.

Third, the Court feels and is of the view that this Defendant, is in need of correctional rehabilitative treatment that can best be provided by commitment to a penal facility.

Next, that he is engaged in a violent pattern of conduct which indicates a serious danger to society.

Next, the sentence is necessary to deter others from the commission of similar offenses.

Next, the emotional trauma suffered by these victims as well as their physical trauma was considered by the Court.

Next, that there was participation with others in the commission of the offense.

It's the final view of the Court that a lesser sentence is not commensurate with the seriousness of the Defendant's crime." (R-84-85-, 57).

On review to the First District Court of Appeal the Appellate Court found only one of the 8 above stated reasons to be permissible, while the remainder were found to be impermissible reasons for deviation from the recommended guideline sentence.

In essence, the Appellate Court determined that the trial Court's prepared list containing a "shopping list" of aggravating and mitigating factors failed the "clear and convincing" test.

The Appellate Court, however, did not reverse or remand for re-sentencing to the trial Court, because "[i]t was satisfied that eliminations of these impermissible reasons from deviation would have no effect upon the trial judge's sentencing decision." See Brooks v. State, AW-337 Appendix: Opinion of First District Court of Appeal, filed October 9, 1984.

First, Brooks would assert that the above conclusion is pure guesswork and unsupported conjecture on the part of the Appellate Court. Additionally, such a conclusion is not relevant to the question posed herein.

The trial court, under the applicable rules, may impose

a sentence departing from the guidelines and of course state its reasons for doing so; however, if the reasons used are later deemed impermissible it is apparent that an Appellate Court would not actually be able to determine whether, and to what extent, the trial judge was influenced by the impermissible reasons in its determination of how much its departure from the sentencing guidelines would have been.

In other words, application of the harmless error rule should not be allowed; if the sentencing judge applies an impermissible reason or a number of them as in the instant case, it is not possible to make a determination that such error is harmless, even though there may be one or more permissible reasons.

The question should be, did the trial court's application of impermissible reasons for the deviation add to the departed sentence? and if so, how much?

In Watts v. State, 410 So. 2d 600 (First District Court of Appeal 1982) the Appellant appealed the trial court's Order revoking his probation on a violation of certain conditions; the state, however, was not able to prove a violation of one of the conditions and later dismissed that particular charge of violation.

The Appellate Court held that "a finding of a violation of that condition as reflected in the written order of revocation was error." Id. at 601. Additionally, the Court went on to state that "we are unable to determine, however, whether the trial judge would have revoked probation and

imposed the same sentence without a violation of the condition [4] and must reverse the order of revocation and remand this cause to the trial judge for such redetermination as may be warranted." Id. See also, Clemons v. State, 388 So. 2d 639 (Fla. 2d DCA 1980).

Brooks then would submit that even though revocation of probation and guideline sentencing departures are two different areas of law, due process principles require the same or very similar treatment.

The defendant respectfully states that this Court should not apply the principles of the harmless error rule as the First District Court of Appeal did when it did not reverse the sentence of the trial judge when it applied the impermissible reasons for its great departure from the sentencing guidelines.

Furthermore, in Davis v. State, ___So. 2d_____, (Fla. 1st DCA 1984) 9 FLW 221 the court stated the following in reference to impermissible reasons for departing from the recommended guideline sentence: "That if there are some acceptable clear and convincing reasons for aggravation, unacceptable ones are surplusage. Nonetheless, we must speculate that the profusion of unacceptable reasons in this case may have affected the extent (emphasis added) of the departure. Here we have both acceptable and unacceptable reasons for departure. To us, it appears more equitable to reverse and remand for resentencing, especially since the trial judge erroneously contemplated parole by retaining

jurisdiction over a third of the sentence. Cynics may observe that a trial judge upon remand will simply decree the same enhanced punishment for the acceptable reasons. Maybe so, and maybe he should. However, he may not and if the last is possible, simple justice requires that the defendant have his day in Court." See also, Higgs v. State, 455 So. 2d 451 (5th DCA 1984).

Therefore, Brooks submits that trial court judge's failure to enter a proper order stating clear and convincing reasons for its departure from the guideline sentence is reversible error. In short, the only remedy in accordance with due process of law should be the vacating of the sentence and the remand for a re-sentencing in accordance to the principle of law.

In conjunction with the argument as stated above, the extent of departure from the recommended guidelines should be reviewed to assure that the term of the departures should be relevant to the reasons for the listed aggravations. Under the guidelines, there is no parole and thus, the length of departure should be reviewed by the Appellate Courts.

In other words, Appellate review should not be limited solely to the initial decision to depart from the guidelines. Additionally, the extent of the departure should be the subject of Appellate review. The defendant would submit that it must and should be.

It cannot be reasonably determined by this Court that the existence of impermissible reasons as applied by the trial

court in its sentencing decision is irrelevant to the length of the sentence imposed; to hold as such would be to state that the Appellate Courts could apply the harmless error rule which as previously indicated would appear to be a task beyond the Appellate Court's power.

In State v. Norton, 328 N. W. 2d 142 (Minn. 1982), the Defendant was convicted of kidnapping and the trial judge later imposed a sentence that was (3) three times the presumptive sentence under a guideline system similar to ours. The Minnesota Supreme Court stated the following:

> The remaining issue is whether these aggravating circumstances were sufficiently aggravating to justify a durational departure of three times the presumptive sentence.
>
> The decision which we must make is whether this is one of the extremely rare cases in which more than a double durational departure is justified. There is no easy-to-apply test to use in making this decision, and there is no clear line that marks the boundary between "aggravating circumstances" justifying a double departure and "severe aggravating circumstances" justifying a greater than double departure. In the final analysis, our decision whether there were "severe aggravating circumstances" must be based on our collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts. It is a decision which must be influenced by the knowledge that if durational departures of greater than two times the presumptive sentence are too easily allowed, the aims of the Sentencing Guidelines, of achieving uniformity of sentencing and of keeping the prison populations at a manageable level, could be under minded.

In essence, the Minnesota Supreme Court has supported the correct position that the existence of impermissible reasons for a departure from the recommended guideline sentence is relevant

to the length of departed sentences. See also, State v. Shiue, 326 N.W. 2d 648 (Minn. 1982); State v. Parlow, 321 N.W. 2d 886 (Minn. 1982) State v. Martinez, 319 N.W. 2d 699 (Minn. 1982); State v. Stumm, 312 N.W. 2d 248 (Minn. 1981); and State v. Evan, 311 N.W. 2d 481 (Minn. 1981).

The law cited above does not in particular address the use of impermissible reasons, however, it does clearly establish the principle that the length of departed sentences must be the subject of appellate consideration.

Brooks submits that the use of impermissible reasons is definitely relevant to the length of departed sentences and should be subject to appellate review. See also, Hendrix v. State, ____ So. 2d.____ (Fla. 5th DCA 1984) 9FLW 1697) (Rule 3.701(d) (11); Bogan v. State, ____ So. 2d ____ (Fla. 1st DCA 1984) 9FLW 1706 ("We do not agree . . . that the departure herein was excessive, in view of the factual circumstances of this case."); Dorman v. State, ____ So. 2d____ (Fla. 1st DCA 1984) 9FLW 1854 ("We do not consider the seven year sentence to be clearly excessive").

Defendant would therefore submit that the principle of review of the term of departures should be expressly adopted and applied to the defendant in the instant case.

As in Young v. State, 455 So. 2d 551 (Fla. 1st DCA 1984), the defendant submits that when reasons for departure are rejected on appeal, the only remedy in accordance with due Process of law, a remand for resentencing is mandated.

In Young, supra, the Court found all aggravating reasons listed by the trial court to be invalid except one and said;

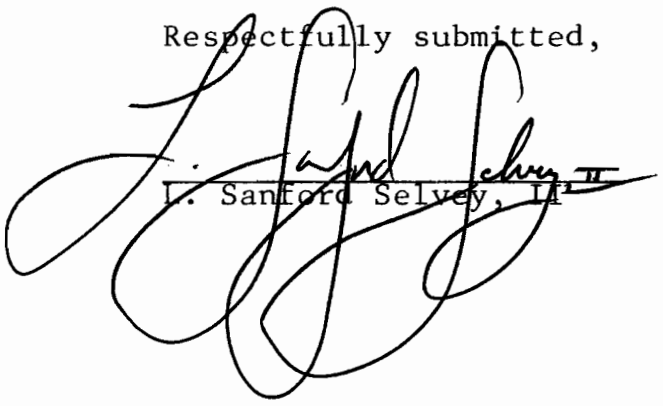
> [W]hen the reason is mired in the confusion revealed by this record, it is impossible to determine whether the trial judge would have come to the same conclusion for this reason alone.

The above stated reasoning applies in the instant cases just as much.

It is total especulation to state unequivocably that the trial court's decision to depart would not have been affected if it had known that only one out of the 8 reasons for departure was valid; it is equally impossible to ascertain what the extent of departure, if any, would have been without the impermissible reasons.

For all of the foregoing reasons the sentence should be reversed and remanded.

Respectfully submitted,



L. Sanford Selvey, II

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, FL 32301 this 4th day of December, 1984.

L. SANFORD SELVEY, II