

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

TIMOTHY LEE CARNEY,

Respondent.

CASE NO. 66,163

FILED

SID J. WHITE

JAN 2 1985 ✓

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the First District Court of Appeal. Petitioner, the State of Florida, was the prosecution and the appellee respectively.

Petitioner's Brief on the Merits will be referred to as "PB" followed by the appropriate page number in parenthesis. References to the appendix attached hereto will be by the symbol "A".

II STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

III ARGUMENT

ISSUE PRESENTED

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 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?

The guidelines attempt to limit departures by requiring clear and convincing reasons be given when a judge does not follow them. Fla.R.Crim.P. 3.701(b), (d)(11). In conjunction with this restraint, the legislature has authorized appellate review whenever a judge departs from a recommended sentence. Section 921.001(5), Florida Statutes (1983).

This case presents the fundamental question of the scope of appellate review when a trial court has abused its discretion in departing from the recommended guidelines sentence.

A brief review of the history and purpose of the guidelines is necessary to focus on the issue presented here. Perhaps the major impetus for developing the guidelines was the desire to eliminate or at least minimize unwarranted variations in sentencing.¹ When the guidelines were adopted they

¹/ Sundberg, Plante and Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla.St.U.L.Rev. 125, 128 (1983).

included a statement of purpose, which in part provides:

The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. 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.Cr. P. 3.701(b).²

The Rule does not eliminate judicial discretion in sentencing, but it does seek to discourage departures from the guidelines. Judges must explain departures in writing and may depart only for reasons that are "clear and convincing." Fla.R.Cr.P. 3.701(b)(6), (d)(11). Moreover, the guidelines direct that departures "should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence." Fla.R.Cr.P. 3.701(d)(11).

The mechanism for carrying out the objectives and purposes of the sentencing guidelines is a series of nine categories of offenses graduated according to severity. Each category has five subdivisions, with points assigned to various factors in each subdivision. Fla.R.Cr.P. 3.988. The

^{2/} This Statement of Purpose remained unchanged when the rules of criminal procedure 3.701 and 3.988 were modified. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451 So.2d 824 (Fla. 1984).

total number of points determines the recommended sentencing range and presumptive sentence. The trial judge has discretion to impose and need not explain reasons for imposing any sentence within the range. Fla.R.Cr.P. 3.701(d)(8).

The state argues in its brief that the trial court has absolute discretion in departing from the guidelines. It would be a monumental waste of time and effort to allow this carefully studied and constructed system to be discarded in favor of traditional notions of judicial sentencing discretion. The guidelines demand more than just casual deference. The guidelines ranges have been constructed on the dual foundations of "current sentencing theory" and "historic sentencing practices" in this state. Thus it is necessary for trial judges to realize that the guidelines have been structured to impose punishment, and they represent the sentencing wisdom of theorists blended with the practicalities gleaned from experience. A trial judge who decides to go outside the guidelines rightfully should have to bear a heavy burden in justifying any departure.

The appellate courts have been assigned the task of preserving uniformity, and by necessary implication, the guidelines themselves. Broadly, two approaches could be taken to appellate review. One, that suggested by the state, would be to accord sentencing judges wide discretion and to uphold departures unless some clear abuse of discretion is demonstrated. This, self-evidently, is tantamount to no review. Furthermore, as departures are approved on appeal more departures will inevitably follow until the guidelines collapse.

This is not an unfounded doomsday prediction, for as one author has noted:

[E]xtraordinary sentences outside the guidelines' ranges can be reviewed by an appellate court to determine if the sentencer's reasons justify an exception to the rule and if the circumstances of the offense and the terms of the sentence are comparable to other extraordinary sentences outside the guidelines. This function is important in order to prevent the exceptions from swallowing the rule in penal systems where sentencers are not always eager to have their discretion limited by rules and may not want to impose sentences outside the guidelines' ranges in the majority of cases.

Ozanne, Bringing the Rule of Law to Criminal Sentencing:

Judicial Review, Sentencing Guidelines and a Policy of Just

Deserts, 13 Loyola University Law Journal 721, 742 (1982).

Similar sentiments were echoed by Judge Sharp in her dissenting opinion in Hendrix v. State, 455 So.2d 449, 451 (Fla. 5th DCA 1984) (Sharp, W., J., dissenting):

The trial judge in this case thought the 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. [Footnote omitted]. Sentencing guidelines in Florida will become an interesting but failed social experiment.

See also, Mischler v. State, 458 So.2d 37, 40 (Fla. 4th DCA 1984) ("Were we to uphold a departure from the guide-

lines in this case, it would serve as authority to do the same in most instances of embezzlement, a result obviously not intended when the guidelines were conceived.").

If the guidelines are to achieve their intended overall purpose of eliminating unwarranted sentencing variations, several ancillary principles must be established by the appellate courts.³ One is that factors which are otherwise already included in the scoring not be a valid basis for departure.⁴ This means that for the normative or prototype offense, in which the defendant's conduct essentially mirrors the usual way of committing the crime, there should be no aggravation (or mitigation). See Thomas v. State, __So.2d__ (Fla. 1st DCA Case Number AW-424, opinion filed December 20, 1984), wherein the court found that otherwise permissible reasons may not justify a departure given the facts of the burglary and theft, which "were perpetrated in a quite common manner." Cf., Davis v. State, 458 So.2d 43 (Fla. 4th DCA 1984).

Likewise, when other offenses at conviction or prior record have already been counted in the scoring, a departure should not be based on these same factors.⁵ The reason is

3/ As one appellate court has lamented on more than one occasion, "The trouble with the sentencing guidelines is that they themselves need guidelines." Mischler v. State, 458 So.2d 37, 39 (Fla. 4th DCA 1984). See also Davis v. State, 458 So.2d 43, 44 (Fla. 4th DCA 1984).

4/ See Fletcher v. State, 457 So.2d 570 (Fla. 5th DCA 1984). See also, Davis v. State, *supra*, and Williams v. State, __So.2d__ (Fla. 4th DCA 1984) [9 FLW 2533] (question certified on appeal).

5/ See, e.g., Young v. State, 455 So.2d 551, 552 (Fla. 1st DCA 1984): "The opinion of the trial court that the guidelines form does not account for additional felonies beyond four is both inaccurate and an impermissible and unconvincing reason for departure. The form contemplates more than four felonies and clearly states "4+."

that the basic criminal conduct which necessarily occurs during the commission of the crime has already been used in setting the proper level of punishment. Likewise, the number of prior offenses as a whole and coupled with the primary and additional offenses at conviction, have been considered in determining the guidelines sentence. If departures are allowed for these same factors each individual judge will be given the power to devise his own set of guidelines.

As equally vital principle which appellate courts must implement in order to preserve the guidelines is that departures should be rejected unless the trial judge's reasons are so clear and convincing that virtually no reasonable person could differ.

By authorizing appellate review the legislature must have intended more than a deferential nod by appellate courts to the unassailable discretion of the trial judge. The requirement of clear and convincing reasons to justify a departure is clear evidence that the legislature intended for departures to be reversed by the appellate courts unless the reasons met that strict standard. Application of the judicial discretion standard urged by the state is inconsistent with the clear and convincing test adopted in the guidelines.

An alternative to the abuse of discretion standard for appellate review would be one analogous to the review of a jury's life recommendation in a capital case. The jury's advisory verdict is entitled to great weight and should be followed unless the reasons for a death sentence are so clear and convincing that virtually no reasonable person

could differ. Tedder v. State, 322 So.2d 908 (Fla. 1975). Similarly, the recommended guidelines range is entitled to great weight and departures from it should be rejected unless the trial judge's reasons are so clear and convincing that virtually no reasonable person would disagree. The state claims that the trial court's decision to depart from the guidelines should be clothed with a presumption of correctness (PB 11). By using the same language as the Tedder test in implementing the sentencing guidelines, this Court recognized that departures from the guidelines should be presumptively suspect rather than presumptively correct. As with a jury's life recommendation, the presumption favors the guidelines rather than the discretion of the trial judge who has departed. Any other approach would nullify the policy of uniformity made by the legislature in authorizing the guidelines and by this Court in adopting them.

In the appellate decisions rendered thus far, two parallel lines of cases have developed. The district courts initially adopted a deferential attitude favoring broad judicial discretion, implying that almost any reason given will be accepted. See, e.g., Addison v. State, 452 So.2d 955, 956 (Fla. 2d DCA 1984) ("While a defendant may appeal a sentence outside the guidelines, it is not the function of this court to re-evaluate the exercise of the trial judge's discretion"); Garcia v. State, 454 So.2d 714, 717 (Fla. 1st DCA 1984) ("[T]he trial courts continue to have the same broad sentencing discretion conferred upon them under the general law, subject only to certain limitations or con-

ditions imposed by the guidelines which are to be narrowly construed so as to encroach as little as possible on the sentencing judge's discretion . . ."). In a separate line of cases, the courts have apparently receded from the notion that judicial sentencing discretion has been relatively unchanged by the guidelines. For example, in Harms v. State, 454 So.2d 689, 690 (Fla. 1st DCA 1984), the First District Court of Appeal held that:

The state inaptly relies on Wilkerson v. State, 322 So.2d 620 (Fla. 3d DCA 1975), as authority for the same breadth of discretion in deviation from the Rule as Wilkerson recognized in the former sentencing process. Such is plainly not the intendment of the rule. [Emphasis added].

In Thomas v. State, supra, the court recognized the paradox between judicial discretion of the trial judge and the requirement that deviations be based on clear and convincing reasons and applied the stricter standard in reversing the appellant's sentence and remanding for resentencing within the guidelines:

We are mindful that sentencing remains largely discretionary, and that the scope of our review is limited to a determination of whether the trial court abused its discretion. Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984); Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984). But where, as here, none of the reasons given by the trial court clearly and convincingly shows why the defendant should receive a more severe sentence than that recommended by the guidelines, we must conclude the trial court erred in departing from the sentencing guidelines.

Slip opinion at 3.

In Williams v. State, supra, the court affirmed that "there still remains the need for articulation of what it is that is clear and convincing," and held that a trial judge may not depart from the guidelines because a harsher sentence will act as a deterrent to others. The court reasoned:

We agree that punishment should be a deterrent, but there is no cause to suppose that a sentence may be enhanced for this reason alone. If that were so, all punishments would automatically be aggravated, the very antithesis of what the guidelines were designed to accomplish.

In Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984), Chief Judge Ervin, specially concurring, noted that the majority had relied on Fla.R.Cr.P. 3.701(b)(6) (. . ."the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion"), to uphold the aggravated sentence, but said that that rule should not have been used to support the majority's apparent conclusion that it "provides a general escape-hatch for trial judges to ignore or depart from sentencing guidelines." Id., at 138. After reviewing the history of the guidelines, and the remedial intent to reduce disparity and subjectivity in the sentencing process, Judge Ervin stated:

The history of the guidelines clearly reflects the remedial intent; as such they should be accorded a liberal construction so as to advance the remedy provided. . . . Conversely, exceptions to the guidelines should be narrowly construed. [Emphasis added].

Id., at 139.

The opinions in Harms, Thomas and Williams, and the dissent in Manning clearly suggest that the trial judge's discretion is not unlimited and should be subject to a stricter standard of review than abuse of discretion.

The decisions rendered so far by the district courts are not, and can not, be harmonious given the dichotomy between allowing wide ranging judicial discretion as opposed to reviewing on appeal the reasons for departure under the stricter standard of "clear and convincing." In exalting judicial discretion, the state asserts that the only explicit prohibition of total judicial discretion in sentencing is Rule 3.701(d)(11) and that virtually any factor may be considered in deviating from the guidelines (PB 16-18). If the guidelines can be circumvented at the whim of the trial judge and with the ease suggested by the state, they will indeed become meaningless. It is improbable that the drafters of the guidelines intended for departure to be so simple.

To curb arbitrariness and preserve uniformity, the stricter "clear and convincing" standard of review must be enforced. Indeed, the "Tedder standard" should apply both to the reasons for departure as well as to the extent of departure. The stated purpose of the guidelines, to eliminate disparity and promote uniformity of sentences on a statewide basis, can never be achieved unless the extent of departure is subject to appellate review to insure that the length of the aggravated sentence bears some reasonable relationship to the reasons for departure. The importance of this review increases in direct proportion to the amount of discretion allowed trial judges

in departures. If virtually any reason suffices as a valid aggravation, and if any one reason automatically permits imposition of any sentence up to the statutory maximum, the guidelines will have failed to achieve their primary goal.

Considering the carefully constructed guidelines apparatus it is certainly anomalous for a trial judge to push all that mechanism aside by finding some reason to depart and imposing arbitrarily any sentence within the statutory limit. At the same time that departures are justified in writing by clear and convincing reasons, those reasons should elucidate the basis for the extent of the departure. Where, as here, the departure was based on seven stated reasons, five of which are deemed impermissible, the severity of the sentence imposed outside the guidelines must be reevaluated after eliminating the impermissible reasons. Some principles of proportionality must be applied to departures if the guidelines are to have any meaning at all once the court finds any clear and convincing reason to justify a departure.

The invalidity of one of several reasons for departure should prompt a remand, just as when a probation revocation has been based in part on a reason found invalid on appeal. This would allow the trial judge to consider both whether any departure is required and if so the extent of that departure. See Watts v. State, 410 So.2d 600 (Fla. 1st DCA 1982) (appellate court could not determine whether trial judge would have revoked probation and imposed same sentence without reliance on violation of a probation condition which on appeal was held not to have been violated); cf. Elledge v.

State, 346 So.2d 998 (Fla. 1977) (appellate court could not know what trial judge would have decided on sentence when some but not all of the aggravating circumstances relied on were held improper on appeal).

In Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), discretionary review pending, State v. Young, Case No. 66,257, the district court struck all but one of the reasons given by the trial court as either impermissibly considered or not clear and convincing, or both. The court remanded to the trial court for resentencing because it was impossible to determine whether the trial court would have come to the same conclusion on the one valid reason alone.

Similarly, in Davis v. State, supra, the court noted that if there are some acceptable clear and convincing reasons for aggravation, unacceptable ones are surplusage, but went on to hold:

Nonetheless, we must speculate that the profusion of unacceptable reasons in this case may have affected the extent 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 enhanced punishment for the acceptable reasons. Maybe so, and maybe he should. However, he may well not and if the last be possible, simple justice requires that the defendant have his day in court. [Emphasis in original].

The reasoning of Young and Davis applies here. Many of the aggravations found by the trial judge are invalid because they are "an inherent component of any robbery" (A 3). Other

reasons are based on conduct for which respondent was not convicted. It is impossible to separate these invalid reasons from others which might arguably support departure. Nor can the court ascertain what the extent of departure, if any, would have been without the improper factors (A 5).

The state would have this Court give undue deference to the trial judge below, Erwin Fleet, because he is a member of the Sentencing Guidelines Commission and "it must be assumed [that he] understood his sentencing discretion" (PB 16). Interestingly, Judge Fleet did not exercise his sentencing discretion since the reasons given below for departure did not even originate with him; he merely adopted verbatim reasons written by the prosecutor. One of those reasons, that respondent had been accused but not convicted of other separate offenses, "flies directly in the face of the prohibition of Rule 3.701(d)(11)" (A 5). Certainly, a member of the Sentencing Guidelines Commission should know that this reason is prohibited.

This case well illustrates the reason why the invalidity of some of the reasons relied upon for aggravation should prompt a remand. Clear and convincing reasons must justify not only the departure, but also the length of the aggravated term. They are not merely justifications to reach a desired sentence. The state contends that "To cause a judge to search out on resentencing one 'clear and convincing' reason already judicially accepted, would be the ultimate form of form over substance" (PB 19). The state dangerously assumes that upon remand the trial judge will simply decree the same enhanced punishment based on only one permissible reason

or that the judge could substitute new aggravations for those stricken on appeal in order to again deviate from the guidelines. Reasons for deviation should not be manipulated so as to reach a desired sentence. Presumably, the trial court doubled the recommended sentence because he believed all seven reasons justified a sentence of ten years. It cannot be assumed that the trial judge would have departed from the guidelines or imposed the same sentence based upon only one or two of the stated grounds. To affirm the sentence without a remand after finding that the majority of the reasons relied upon were inappropriate would be the ultimate form of the ends justifying the means.

Petitioner's brief brings into sharp focus the fundamental issue of whether on appeal the presumption of correctness should favor the recommended sentence or the trial judge's discretion in departing. The guidelines do not address this point but rather reflect almost hopeless indecision by juxtaposing "clear and convincing" reasons for departure against the disclaimer of not intending to "usurp judicial discretion." Respondent maintains that the guidelines' recommendation, and not the discretion of the individual trial judge, was intended to enjoy favored status on appeal. To hold otherwise would undoubtedly condemn the guidelines as "an interesting but failed social experiment."

In light of the foregoing, respondent respectfully submits that the certified question should be answered by holding that 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, the case should be remanded for a resentencing.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent respectfully requests that this Court affirm the decision of the First District Court of Appeal reversing respondent's sentence and remanding the cause for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Respondent's Brief on the Merits has been furnished by hand delivery to Mr. Thomas Bateman, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; and to respondent, Timothy Lee Carney, #092355, Post Office Box 500, Olustee, Florida 32072 on this 2nd day of January, 1985.

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