O/a 6-6-85

IN THE SUPREME COURT
OF FLORIDA

LLOYD E. ALBRITTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 66,169

ANSWER BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

POINT I

Where there exists at least one valid clear and convincing reason for departure, even though the trial judge may have cited other invalid reasons, the appellate court should always affirm except where it is clear from the record that the trial judge would have altered his sentencing decision due to the elimination of one or more of the reasons given for departure. To that extent, the trial judge should be required to make such a finding on the record (or the defendant should be required to make that inquiry of the trial judge).

The appellate court should affirm because we can make three assumptions concerning the trial judge's sentencing discretion. First, that he understood his sentencing discretion. Second, that the trial judge knew that the "mere existence" of clear and convincing reasons for departure never require departure. Third, that the trial judge intended to depart if legally permissible.

If the trial court states on the record whether or not elimination of one or more of the reasons for departure would have altered his sentencing decision, then the appellate court can provide meaningful review. The defendant is protected in that after affirmance he may move the court to modify or reduce sentence.

Respondent's approach would serve to stem the tide of appeals on this issue, give finality to the trial court's sentencing discretion, and not discourage the trial court from stating all of his reasons for departure. Under petitioner's

approach, the trial court would be inclined to state only that reason he knows to be clear and convincing. The trial judge is going to be the final arbitrator of the sentence under either approach.

POINT II

The guidelines do not establish a "cap" on departure sentences. The drafters of the guidelines assumably considered the advisability and need for such a "cap". The omission from the guidelines of a "cap" indicate that the drafters did not intend one. The drafters were aware that parole would not be applicable to departure sentences. If such a "cap" is to be established, it should be done by the drafters of the sentencing guidelines, and not by the appellate courts.

POINT I

THE DISTRICT COURT DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DECISION TO DEPART FROM THE SENTENCING GUIDELINES BASED ON ONLY ONE OF THE TRIAL COURT'S THREE STATED REASONS.

ARGUMENT

In the instant cause we are presented with the question; What should an appellate court do when it finds a trial court, in deciding to depart from the guidelines, has relied on some reasons which are proper and "clear and convincing", and some reasons which are improper or not "clear and convincing?" This of course assumes that the remaining reason(s) standing alone is sufficient to support a departure sentence. That is, if the trial court had cited that reason(s) alone, the sentence would have been affirmed.

There are two (2) concerns where valid reasons for departure are mixed with invalid reasons. First, would the trial court have departed at all on the basis of the valid reason(s) alone? Second, would the trial court have departed to the same extent based on the valid reason(s) alone? Since there exists a clear and convincing reason for departure, the real question before the appellate court in the instant circumstance is, would the trial court have departed (and to the same extent) based on the valid reason(s) alone? This is not an easy determination for the appellate court to make.

What should the appellate court do in the instant circumstance? There are three (3) options; always affirm, always remand, or determine each case on an ad hoc basis. The

appellate court could always affirm because there does exist a clear and convincing reason for departure, upon which any departure sentence could be upheld. But, this approach ignores the question of whether the elimination of one or more of the reasons for departure would have altered the trial judge's sentencing decision. The appellate court could always remand because it is virtually impossible to definitively determine whether or not the trial judge would have altered the sentencing decision. Finally, the appellate court could determine each case on an ad hoc basis. The appellate court would need to determine whether or not the trial judge would have departed and departed to the same extent based on the remaining reason(s) alone. The appellate court would then affirm in those cases where the judge clearly would have departed (and to the same extent) on the remaining reason(s) alone. The appellate court would remand where that determination could not be made or the judge clearly would have decided differently.

Respondent contends that the appellate court should always affirm a sentence where valid reasons for departure exist amongst invalid reasons for departure, except where the record clearly indicates that the judge would have altered his sentencing decision due to the elimination from consideration of one or more of the cited reasons for departure. Respondent contends that it would be prudent to require the trial court to make a finding on the record as to whether or not the elimination from consideration of one or more of the cited reasons for departure would alter his sentencing decision. To that extent, the defendant should be required to make such an

inquiry of the court. This would preserve the record for accurate and meaningful appellate review.

In Judge Cowart's well-reasoned opinion in the instant cause, he draws three (3) assumptions concerning the trial court and its sentencing discretion. First, we assume that the trial judge understood his sentencing discretion. Second, we assume that the trial judge knew that the "mere existence" of clear and convincing reasons for departure did not require departure. Third, we assume that the trial judge believed that a departure sentence should be imposed if legally possible in that particular case. Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984). Respondent contends that these are valid assumptions. The trial judge made the determination that the recommended guidelines sentence for the particular individual was inappropriate and that the judge would impose a departure sentence if legally permissible. If the elimination of one or more of the cited reasons for departure would have affected his sentencing decision, the record should indicate such. We should assume that the trial court did not depart merely because reasons for departure existed, but, rather, that the trial court felt that this particular defendant in these particular circumstances should have a more severe sentence. Therefore, the trial court would have departed even though only one of the various reasons cited as a bsis for departure was clear and convincing. Generally, this assumption would be correct. Certainly there would be circumstances where the trial court would not have departed (or would not have departed to the same extent) based solely on the reasons

upheld by the appellate court. To this extent respondent advocates the position that the trial court should be required to state on the record whether or not its sentencing decision would be the same if any of the reasons cited for departure were found invalid.

Respondent does not advocate a per se harmless error rule. Rather, respondent advocates a rule which allows the application of the harmless error rule in every circumstance except in those rare circumstances where the record indicates that the trial judge would have made a different sentencing decision if one or more of the reasons cited were found to be improper or not clear and convincing. Furthermore, it should be the defendant's burden to demonstrate from the record that the trial court would have altered its sentencing decision if one or more of the reasons for departure were eliminated.

Petitioner contends that the appellate court should always reverse and remand for resentencing, unless the appellate court can determine that the trial judge would not have altered his sentencing decision.

The results under either the petitioner's or the respondent's approach would be ultimately the same. Under either approach the appellate court would review the reasons for departure and determine which were valid and which were not valid reasons. Then the trial court would have the final word on the sentence based on the valid reasons alone. Under petitioner's approach, when a departure sentence is based on multiple reasons and the appellate court finds at least one but not all of the reasons clear and convincing, the appellate court would

remand the cause for resentencing unless the record clearly indicated that the elimination of one or more of the reasons for departure would not have made a difference in the trial court's sentencing decision. On remand to the trial court, the judge would either, (1) impose the same sentence based on the valid reason only, or (2) modify the sentence by either not departing at all or departing to less of an extent based on the valid reasons only. Under respondent's approach, when a departure sentence is based on multiple reasons and the appellate court finds that at least one but not all of the reasons were clear and convincing, the appellate court would affirm, distinguishing which reasons were valid and which reasons were not. The appellate court would affirm based on the assumption that the trial judge intended to depart if legally permissible. As Judge Cowart stated, "This assumption in the trial judge's continuing belief in the propriety of a departure sentence is especially safe in view of the trial court's great discretion under Florida Rule of Criminal Procedure 3.800(b), to reduce or modify even a legal sentence imposed by it within sixty (60) days after receipt of an appellate mandate affirming the sentence on appeal." Albritton v. State, supra. The defendant has the right to bring a motion to modify the sentence under Rule 3.800. If the trial court denies defendant's motion, the result would be the same as if the trial court had simply imposed the same sentence based on the reason(s) found to be valid alone. Otherwise, the court could reduce defendant's sentence to a shorter term of incarceration based on the valid reason only or give a guidelines sentence.

The end result would be the same because even upon remand if the trial judge imposes the same sentence, he merely needs to cite only to the reason(s) found to be valid and his decision will never be overturned on appeal.

This brings us back to the original question, would the trial judge have departed (and to the same extent) based on the valid reason(s) alone? This question can only be answered by the trial judge, either on remand or on a motion to reduce sentence, and his discretion is always going to be the final say so because the same sentence citing only those reasons seen as valid will never be overturned on appeal. Where the record clearly indicates whether the judge would have altered his sentencing decision or not, then the affirmance/reversal decision is obvious. In the area in between, the question can only be answered by the trial judge. There are several reasons why the position advocated by respondent is preferable. There is a flood of appeals based on the issue presented in the instant cause. Affirming departure sentences where at least one clear and convincing reason for departure exists would give finality to the sentencing decision. Since we can assume that the trial judge intended to depart if legally permissible, the finality of the sentencing decision is appropriate, especially if we require the trial judge to state on the record (or the defendant to inquire of the judge) whether or not the elimination of one or more reasons cited for departure would alter his sentencing decision. Furthermore, refinement of the guidelines and the law interpreting them is badly needed. Lastly, it is best not to discourage the trial judge from enumerating

all of his reasons for departure. Under petitioner's approach, a departure sentence which cites any questionable reasons for departure would always be appealed (unless perhaps the trial judge stated that the elimination of one or more of the reasons for departure would not alter his sentencing decision), because the petitioner would generally get a reversal and remand. Under respondent's approach, a departure sentence which cites at least one valid reason for departure would generally not be appealed (unless the juge states that the elimination of one or more of the cited reasons would alter his sentencing decision), because these sentences would always be affirmed. If the elimination of one or more of the cited reasons for departure would not have altered the trial court's sentencing decision, then the appeal is meaningless. This is the reason why petitioner's position would create unnecessary and meaningless appeals. The position advocated by respondent would serve to streamline appellate review of departure sentences, and would serve to give finality to the sentencing decisions of the trial court. The defendant is still protected by his right to address the propriety of the sentence after affirmance by an appellate court on a motion to reduce sentence, pursuant to Florida Rule of Criminal Procedure 3.800. If the court would have changed its mind on remand, it also would have changed its mind on a motion to modify sentence when presented with the appellate court's opinion stating which reasons were valid and which reasons were not.

The position advocated by respondent would address

the concerns of the First District Court of Appeal in Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984). In each and every case, the appellate court would know whether or not the trial judge's decision would have been altered by the elimination of one or more of the reasons for departure. This position would eliminate endless, unnecessary remands. Harden v. State, 428 So.2d 316 (Fla. 4th DCA 1983) and Webb v. State, 454 So.2d 616 (Fla. 5th DCA 1984), deal with abuse of discretion by the trial court in sentencing an appellant. That standard is different than the instant cause which deals with valid reasons for departure mixed with invalid reasons for departure from a guidelines sentence. The probation revocation cases cited by petitioner deal with a similar but less definitive standard. A similar discretion is involved in probation revocation, but probation revocation cases are not as readily susceptible to the assumption that the trial judge would have revoked the defendant anyway even though certain violations were found to be unsupported by the record. In the context of the guidelines, it is much more readily assumable that the trial judge would have departed based on the valid reasons alone.

In summary, respondent advocates the position that the appellate court should always affirm a departure sentence where at least one valid reason for departure exists unless the record clearly indicates that the trial judge would have altered his sentencing decision due to the elimination of one or more of the cited reasons for departure. To promote accurate and meaningful appellate review, the trial court should be required to state on the record if elimination of one or

more of the cited reasons for departure would alter his sentencing decision, (or require the defendant to make that inquiry). Upon affirmance of his sentence a defendant could then move the trial court to modify or reduce his sentence due to the elimination of certain reasons for departure. This approach would result in the same sentence as petitioner's approach, except that defendants would not appeal sentences they know the trial judge would not change. Adoption of a rule of law in this regard would create workable basis for addressing guidelines departure sentences. There is a need to refine the sentencing guidelines and respondent contends this approach would best serve that purpose. The decision of the Fifth District Court of Appeal in the instant cause was properly rendered. It is clear that from the record the trial court would have departed on the basis of petitioner's prior record alone. The egregious circumstances of this case give a vivid example of the futility of remanding a cause such as the instant one. Nothing in the record really indicates whether or not the judge would have made a different decision based on the one valid reason for departure alone. But, it is not at all likely that the petitioner's sentence would be altered upon remand. Besides, petitioner can still request the trial court to modify his sentence in a motion to reduce or modify sentence. Respondent contends the instant decision should be affirmed.

POINT II

THE DISTRICT COURT DID NOT ERR IN REFUSING TO REVIEW THE EXTENT OF THE DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE.

ARGUMENT

The issue presented here is whether the appellate court should review the extent of the departure when the trial court properly departs from the recommended guidelines sentence. The Fifth District Court of Appeal resolved this question in the instant case stating:

> The Florida sentencing guidelines place no restrictions on a departure sentence, hence the only lawful limitation on a departure sentence is the maximum statutory sentence authorized by statute for the offense in question.

Albritton v. State, supra.

Respondent contends that the position taken by the Fifth District Court of Appeal represents the proper interpretation of the Florida sentencing guidelines. Any restriction on departure sentences which are within the statutory range should be established by the drafters of the sentencing guidelines. The advisability and the need for such a restriction assumably was considered by the Guidelines Commission. The omission of any "cap" on departure sentences indicates the intention that departure sentences are bounded only by judicial discretion and the statutory maximum. Abuse of judicial discretion should be the standard of review for departure sentences. Proportionality of sentences is and should be the concern of the drafters of the sentencing guidelines and not the appellate courts. The Sentencing Guidelines Commission is

evaluating departure sentences and is in the best position to fashion the rules to attain the desired uniformity of sentencing. The trial judge has the "feel" of the case and is in the best position to determine the appropriate sentence for each individual. The First District Court of Appeal has taken the same position adopted by the Fifth on this issue. See, Dorman v. State, 457 So.2d 503 (Fla. 1st DCA 1984); Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984).

Petitioner contends that the potential for abuse of judicial discretion under the guidelines becomes much greater than before the guidelines took effect. He contends that before the guidelines, on a lengthy sentence, the trial court's sentencing decision actually had little effect on the time served because the Parole Commission set the prisoner's release date. The Fifth District Court of Appeal has held that under the guidelines, the defendant is no longer entitled to parole even upon departure. Czarnecki v. State, 10 F.L.W. 822 (Fla. 5th DCA, Mar. 28, 1985). Gain time is still applicable though. § 921.001 (8), Fla. Stat. (1983). Therefore, the only thing a defendant loses under the guidelines is the parole potential.

Parole is not a sentencing consideration. Parole is the concern of the executive branch. The elligibility for parole has never been a consideration in the trial court's sentencing discretion (except that the trial court could prevent parole before one-third of the sentence is served by retention of jurisdiction). Section 921.001(8), Florida Statutes (1983), does not affect parole. Rather, it makes parole inapplicable to persons sentenced under the guidelines. The Sentencing

Guidelines Commission must have realized that this would serve to lengthen the actual time served by a defendant who is sentenced to a long prison term. In assigning the point values to be assessed for calculation of the recommended guidelines sentence, the Sentencing Commission assumably recognized that parole would not apply. The guidelines clearly express that judicial discretion is not intended to be usurped, and that the trial court may depart based on clear and convincing reasons. Fla. R. Crim. P. 3.701(b)(6). The Guidelines Commission assumably recognized that a departure sentence may be imposed and that parole would not be applicable to such a sentence.

If this court determines that some form of departure "cap" is warranted, respondent contends that petitioner's proposal to limit the trial court to a one cell departure is far too restrictive. This would in essence, totally eliminate judicial discretion in sentencing except within the narrow range of two cells. This is clearly not the intent of the guidelines. This would create the absurd result where the trial court could "bump" a defendant up one cell for a violation of probation without citing clear and convincing reasons, yet require a trial judge to cite clear and convincing reasons for "bumping" up one cell in a case where the situation clearly warrants significant departure. Respondent contends that a durational limit such as double or triple the recommended sentence would be more appropriate.

In summary, the omission of a "cap" on departure sentences in the Florida sentencing guidelines indicates that

such a "cap" was not intended. The guidelines did not intend to usurp judicial discretion. The Sentencing Commission assumably understood that departure sentences would be within the maximum statutory range and that parole would not be applicable to such sentences. Any restriction on departure sentences which are within the statutory range should be established by the drafters of the sentencing guidelines.

CONCLUSION

Based on the authorities and arguments presented herein, appellee respectfully requests this honorable court to affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief On The Merits has been furnished by mail to Daniel Schaefer, Assistant Public Defender, 1012 S. Ridgewood Avenue, Daytona Beach, Fl. 32014-6183, counsel for the Petitioner, this 22nd day of April, 1985.

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