IN THE SUPREME COURT OF FLORIDA

LLOYD E. ALBRITTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,169

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On September 19, 1983 the Petitioner, LLOYD E. ALBRITTON, was charged by information with Murder in the Second Degree, D.U.I. Manslaughter, and Driving While License Suspended or Revoked (R46). Petitioner pled guilty to Counts II and III, and the State nol prossed the Second Degree Murder charge (R72-79).

Sentencing was held on January 25, 1984 before the Honorable Robert B. McGregor, Circuit Judge (R1-29). Petitioner announced his formal election to be sentenced under the sentencing guidelines (R6). He did not dispute the fact that he had at least six prior convictions for Driving Under the Influence of Alcohol (R8-9), nor did he dispute the guidelines scoresheet prepared for the court (R6). The scoresheet placed Petitioner in the three to seven (3-7) year range of recommended sentences (R101-102). The State argued the trial court should depart from the guidelines, while Petitioner urged that the recommended sentence be imposed (R7-17).

The court decided to depart from the guidelines, stating its reasons on the record, and in a written order (R22-27, 103). The reasons for departure, as stated in the written order were as follows:

> 1. At the time of this offense, the defendant's driving privilege was revoked, a factor which is not scored on the guidelines scoresheet and should be considered in determining the appropriate sentence in this cause.

> 2. The defendant's driving record reflects that he has been convicted of Driving Under the Influence upon seven occasions over a fifteen-year period. Although the guidelines scores a factor for prior misdemeanors, these prior convictions are not the usual miscellaneous grouping of offenses but instead reflect a continuing series of violations of the same law, that is, Driving Under the Influence and as such deserve greater weight than provided under the guidelines. On account of these convictions, the defendant, LLOYD EDGAR ALBRITTON, had seven prior opportunities to correct this behavior and his failure to do so demonstrates his utter contempt for the law.
> 3. The presumptive sentence under the guidelines is neither appropriate nor in keeping with the way our society values human life.

The court sentenced Petitioner to fifteen years on the D.U.I. Manslaughter charge, with the final three years to be served on probation (R76). An additional year of probation was added for the charge of Driving While License Revoked or Suspended (R78).

On appeal, Petitioner argued that his sentence should be reversed because none of the three reasons given by the trial court for its departure from the recommended guidelines sentence were "clear and convincing". Petitioner argued alternatively that should the District Court of Appeal find one or more of the reasons sufficient while rejecting one or more other reasons, the case should be remanded for consideration of whether departure is justified solely on the basis of the reasons found sufficient by

the appellate court. Petitioner further argued that even if the District Court were to accept as "clear and convincing" the trial court's reasons for exceeding the recommended sentence, his sixteen year sentence should still be reversed as clearly excessive. Petitioner argued the Appellate Court must consider the extent of departure if the guidelines purpose of eliminating unwarranted sentencing disparity is to be achieved.

In its opinion rendered September 27, 1984 the District Court of Appeal affirmed Petitioner's sentence. The Court based its decision on only one of the trial court's three stated reasons for departure. One reason was found to be erroneous and another was not addressed. The trial court's third reason, Petitioner's prior D.U.I. convictions, was found sufficient to justify the sentence imposed. The District Court rejected Petitioner's contention that remand was necessary to allow the trial court to impose sentence while considering only the reasons found to be "clear and convincing". The District Court stated:

> We assume the trial judge understood his sentencing discretion and understood that the mere existence of "clear and convincing reasons" for departing from the sentencing guidelines never requires the imposition of a departure sentence and that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible. Accordingly, a departure sentence can be upheld on appeal if it is supported by any valid ("clear and convincing") reason without the necessity of a remand in every case.

The District Court also rejected Petitioner's conten-

tion that it should review the length of the departure from the recommended sentence, 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.

Petitioner filed Notice to Invoke Discretionary Review on November 13, 1984.

ARGUMENTS

POINT I

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL CONFLICTS WITH BOGAN V. STATE, 454 So.2d 686 (Fla. 1st DCA 1984); SWAIN V.STATE, 455 So.2d 533 (Fla. 1st DCA 1984); AND DORMAN V. STATE, 9 FLW 1854 (Fla. 1st DCA August 24,1984).

In each of the three cases cited above the First District Court of Appeal affirmed a trial court decision to depart from a recommended guidelines sentence. In each case the Appellant argued the sentence imposed was excessive. In each case their argument was rejected. However, it is apparent from the language of the opinions that the First District Court would review the length of departure in approximate cases. In Bogan v. State, supra, the court stated: "We do not agree with Bogan that the departure herein was excessive, in view of the factual circumstances of this case". (Emphasis added).

In Swain v. State, supra, the court wrote:

> Appellant argues alternatively that, if departure from the guidelines is justified, the departure in the instant case is excessive. The sentencing guidelines do not explicitly provide any guidance for trial courts in determining a sentence once the trial court has validly departed from the guidelines. The sentences sub judice are within the parameters established by the Legislature. On the facts of the instant case, we decline to hold that the sentences are excessive. (Emphasis added)(Footnote omitted).

Finally, in Dorman v. State, supra, the court, after finding departure from the guidelines acceptable stated: "Moreover, we do not consider the seven year sentence to be clearly excessive".

In Petitioner's case, the Fifth District Court of Appeal refused to review the extent of departure, 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".

While the First District Court has not yet reversed a guidelines sentence based on the length of departure, it has recognized the need for this type of review in the proper case. This view is in conflict with the Fifth District Court's blanket rule against any limitation on the length of departure short of the statutory maximum sentence. The Florida Supreme Court should accept jurisdiction in Petitioner's case to settle this crucial question. The issue is unlikely to be squarely addressed at the District Court level because it involves the unenviable task of setting a new standard with very little guidance from existing laws. However, it is a question that must be decided. Since the guidelines legislation abolishes the parole system, a policy of accepting unlimited departures based on no more justification than that required to uphold a one year departure will inevitably lead to vastly increased sentences from those trial judges who routinely depart from the guidelines. Such a policy will serve to increase the unwarranted sentencing disparity the guidelines were designed to eliminate.

POINT II

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL CONFLICTS WITH CARNEY V. STATE, 9 FLW 2143 (Fla. 1st DCA October 9, 1984).

In the instant case the Fifth District Court of Appeal stated its view that it would uphold sentences departing from the guidelines as long as any valid reason for departure is found by the trial court; this despite the fact that other reasons stated by the lower court are held to be improper. The District Court stated it would assume "that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible".

The First District Court of Appeal has taken a different approach to this problem. In Carney v. State, supra, the court announced the following rule:

> We think a more appropriate rule-one which would allow greater flexibility to the trial court, but still preserve the substantial rights of the accused to have meaningful appellate review of a sentence outside the guidelines-would be to affirm the trial court's sentencing departure where impermissible as well as permissible reasons for departure are stated, where the reviewing court finds that the trial court's decision to depart from the guidelines, or the severity of the sentence imposed outside the guidelines, would not have been affected by elimination of the impermissible reasons or factors stated. A similar standard for review has been adopted by the Florida Supreme Court in death penalty cases where valid

> as well as invalid aggravating factors have been considered by the trial court. See Bassett v. State, 449 So.2d 803,808 (Fla. 1984), quoting Brown v. State, 381 So.2d 690,696 (Fla. 1980), cert. den., 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981); See also, Jackson v. Wainwright, 421 So.2d 1385,1388 (Fla. 1982), cert. den., ___ U.S. ____, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983); Straight v. State, 397 So.2d 903 (Fla. 1981), cert. den., 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). (Emphasis added).

The standard of review adopted in Carney, supra, directly conflicts with the approach taken by the Fifth District Court in Petitioner's case. The Florida Supreme Court is urged to accept jurisdiction in Petitioner's case to resolve this conflict.

In evaluating the importance of this issue it should be noted that the First District Court has certified the following question as 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 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.

Young v. State, 9 FLW 1847 (Fla. 1st DCA August 24, 1984); Mitchell v. State, 9 FLW 2107 (Fla. 1st DCA October 2, 1984); Brooks v. State, 9 FLW 2135 (Fla. 1st DCA October 9, 1984).

CONCLUSION

For the reasons expressed herein, the Petitioner respectfully requests this Honorable Court to accept jurisdiction of this cause and reverse the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Lloyd E. Albritton, Inmate No. 092741, Lake Correctional Institute, P.O. Box 99, Clermont, Florida 32711, on this 26th day of November, 1984.

Daniel J. Schafer

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ASSISTANT PUBLIC DEFENDER