IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

KAREN A. MISCHLER,

Respondent.

CASE NO. 66,191

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner, STATE OF FLORIDA, was the prosecution, and Respondent, KAREN A. MISCHLER, was the defendant, in the trial, post-trial and sentencing proceedings held in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this Reply Brief, the STATE OF FLORIDA and KAREN A. MISCHLER will be referred to as Petitioner and Respondent, respectively.

Additionally, the symbol "R" means Record-on-Appeal in the above-styled cause; "AR" means the Additional Record on Appeal; "e.a." means "emphasis added"; and "A" means the Appendix attached to Petitioner's Initial Brief.

POINTS ON APPEAL

POINT I

WHETHER AMICUS CURIAE'S SUGGESTED STANDARD OF REVIEW OF TRIAL COURT'S GUIDELINES DEPARTURE SENTENCES ERRONEOUSLY MISINTERPRETS PURPOSE OF GUIDELINES, AND TRIAL COURT'S FUNCTION IN SENTENCING CRIMINAL DEFENDANTS?

POINT II

WHETHER THE TRIAL COURT MAY AND DID APPROPRIATELY CONSIDER "CIRCUMSTANCES of OFFENSE" AS PROPER BASIS FOR DEVIATION?

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POINT IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DESPONDENT'S MOTION FOR NEW TRIAL?

SUMMARY OF ARGUMENT

The suggested standard of appellate review of guidelines-departure sentences by amicus curiae, ignores the express language of the guidelines, and would result in de facto elimination of departure in sentences which are properly based on, and commensurate with, the severity and circumstances of the offense.

The trial court should, and did, appropriately consider circumstances of the offense and offender, as proper bases for guidelines departure (including those factors which may have been included in computation of the score-sheet), under the specific language of Rule 3.701 of the Florida Rules of Criminal Procedure (1983).

Since there was at least one appropriate basis relied on by the trial court in its guidelines-departure sentence, this Court should affirm the sentence, not remand same, since such result would amount to improper appellate review of the extent of the trial court's departure in sentencing.

Finally, Respondent's new trial motion was appropriately denied by the trial court (a result tacitly approved by the Fourth District), since the Record of the subject voir dire was not transcribed or reported, and does not otherwise indicate that juror Warman committed misconduct, or prejudiced Respondent per se by his presence on the jury.

ARGUMENT

POINT I

AMICUS CURIAE'S SUGGESTED STANDARD OF REVIEW OF TRIAL COURT'S GUIDELINES DEPARTURE SENTENCES, ERRONEOUSLY MISINTERPRETS PURPOSE OF GUIDELINES, AND TRIAL COURT'S FUNCTION IN SENTENCING CRIMINAL DEFENDANTS.

In its response to Petitioner's Brief, amicus curiae suggests a standard of review for appellate courts, of a trial court's discretionary departure sentence, which appears to wholly misinterpret the "minimization of disparity in sentencing" function of the guidelines, and provide an intrusive procedure for appellate review that ignores a trial court's continued sentencing discretion under the guidelines.

The public defender's office urges adoption by this Court of the "clear and convincing" standard as stated in Tedder v. State, 322 So.2d 908 (Fla. 1975), by this Court. In said decision, this Court did not define such a term, per se, rather, the Court indicated that a trial court's "override" of a jury recommendation of life imprisonment be based on reasons" so clear and convincing that no reasonable person could differ." Tedder, supra, at 910 (e.a.). The application of such a standard to review of guidelines departure sentences would effectively result in de facto elimination of departure sentencing, by abrogating the discretion, retained by trial courts under the guidelines (Rule 3.701(b)(6)(1984), to go outside them when the particular circumstances and severity of the offense make the guidelines' recommended sentence an inadequate one. Murphy

v. State, 459 So.2d 337 (Fla. 5th DCA 1984); Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984). To require that departure can only be properly supported by reasons "with which no reasonable person could differ", contradicts such discretion, by sacrificing individualized consideration of particular characteristics of an offender or offense, see Lockett v. Ohio, 438 U.S. 586 (1978), for a purely result-oriented approach. Furthermore, the imposition of the Tedder standard would necessarily invite de novo appellate review of a discretionary decision by a trial court, which cannot and should not be measured by whether all reasonable men would agree with a discretionary basis for departure. Such an approach ignores the provisions and intent of the guidelines themselves, and leads to formulaic sentencing. Petitioner's Initial Brief, at 14-19.

The public defender's conclusion that application of the "abuse of discretion" standard of review espoused by several courts in this state, amounts to "rubber-stamp" meaningless appellate review, is a wholly unsubstantiated and preposterous presumption. As argued in the previous brief, such a standard is capable of application, and has been utilized in review of a variety of legal issues, including but not limited to review of a trial court's evidentiary rulings e.g., Palmes v. State, 397 So.2d 648 (Fla. 1980), cert. denied, 454 U.S. 882, 102 So.Ct 369, 70 L.Ed.2d 195 (1981). This approach adopts the intent of the writers of the guidelines that judicial sentencing discretion was not to be eliminated or limited, by any prohibitions other than those imposed by the specific provisions of the

guidelines. Garcia, supra; Murphy, supra; Johnson v. State, 10 FLW 18 (Fla. 1st DCA, December 21, 1984); also, see Initial Brief, at 14-15. An "abuse of discretion" standard of review will not necessarily result in pro forma affirmance of a trial court's sentencing departure reasons, as amicus suggests, but would merely focus upon the reasonableness of reasons relied upon for departure, Initial Brief, at 16-20, and appropriately place ultimate responsibility for sentencing on the trial court. State v. Reed, 421 So.2d 754 (Fla. 4th DCA 1982); also, see Murphy; Garcia.

Finally, Petitioner does not suggest that sentencing under the guidelines, under such standards discussed herein and in the initial brief, would be "untrammelled and unguided". Brief of amicus curiae, at 9. The essential difference between Petitioner's argument, and that of amicus, is that the public defender has fallen prey to the view that guidelines sentencing is a radical departure from traditional sentencing, and calls for rigid adherence to "recommended" sentences under the guidelines, and total elimination of disparity in sentencing. As pointed out by both commentators relied upon by Petitioner, and by the guidelines themselves, such a viewpoint misses the whole purpose of guidelines in seeking to reduce unwarranted disparity, but allow for disparity when warranted by the particular circumstances of a defendant or crime. Petitioner's Brief, at 14-20.

POINT II

TRIAL COURT MAY AND DID APPROPRIATELY CONSIDER "CIRCUMSTANCES OF OFFENSE" AS PROPER BASIS FOR DEVIATION.

Appellee wholly relies upon its arguments in Points II and III of its Initial Brief, to rebut the positions of amicus in Point II. However, brief elaboration is required on a new argument raised by the public defender.

The public defender espouses the position that the stated reasons for departure were inherent elements of the crime for which Respondent was convicted, and thus improperly factored in both the scoresheet and as a basis for departure. In so stating, amicus again ignores the specific language of Rule 3.701(d)(11), and the Statement of Purpose, which permits (and, in fact, mandates) that the penalty to be imposed, under guidelines or departures from same, can include and be commensurate with the "circumstances of the offense". Gardener v. State, 10 FLW 294 (Fla. 2nd DCA, January 30, 1985); Johnson v. State, 10 FLW 18 (Fla. 1st DCA, December 21, 1984); Murphy, supra; Garcia, supra.[1] Furthermore, amicus curiae's objections and opposition to so-called "double dipping" has been rejected by numerous other district court decisions. McCuiston v. State, 10 FLW 252 (Fla. 2nd DCA, January 23, 1985)(as amended); Deer v. State, 10 FLW 147 (Fla. 5th DCA, January 10, 1985); Hendrix v. State,

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[1] The Fourth District, in its own opinion citing the decision in Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984), at least implicitly recognizes this language in Rule 3.701(d)(11). Mischler v. State, slip op, at 5; see also Gardener, supra, at 294.

455 So.2d 449 (Fla. 5th DCA 1984); Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984); Davis v. State, 458 So.2d 42, 44 (Fla. 4th DCA 1984). In sum, the position of amicus curiae has taken the untenable position of asking this Court to proscribe the consideration of certain factors in departure sentencing, by legislative fiat; no such limitations were expressed or contemplated, in the formulation or adoption of the guidelines. Murphy, supra; Hendrix, supra; Thayer v. State, 335 So.2d 815 (Fla. 1976); Spitzmiller, An Examination of Issues in the Florida Sentencing Guidelines, 8 Nova Law Journal 687, 700 (1984); Sundberg, Plante & Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Florida State University Law Review 125, 142 (1983)(hereinafter referred to as "Spitzmiller" and "Sundberg", respectively).

POINT III

SINCE AT LEAST ONE OF AGGRAVATING CIRCUMSTANCES RELIED UPON BY TRIAL COURT WAS APPROPRIATELY CLEAR AND CONVINCING, APPELLATE COURT SHOULD AFFIRM DEPARTURE SENTENCE.

Petitioner relies on its argument on this point, in Point IV of its Initital Brief, as rebuttal of amicus curiae's position in Point III of its brief. Petitioner would briefly add that acceptance of the public defender's position, would permit stringent appellate review of the extent of a trial court's departure from the guidelines, a result clearly not contemplated by the retention of discretion in the guidelines. Williard v. State, 10 FLW 213 (Fla. 2nd DCA, January 16, 1985); Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984); Davis, supra.

POINT IV

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RESPONDENT'S MOTION FOR NEW TRIAL. 2

The public defender's final contention is that the trial court erroneously denied her new trial motion, even though apprised that a juror had informed the prosecutor, after trial, that he was under prosecution, pending sentence, on criminal charges. Appellant's unverified Motion essentially alleged, and defense counsel argued, that the juror's failure to disclose this information during voir dire or at anytime during trial, amounted to jury misconduct, necessitating the granting of a new trial. (R, 543-546; AR, 4-5); Rule 3.600(3)(b)(4), Florida Rules of Criminal Procedure (1972). For procedural and substantive reasons, this allegation of error by Appellant is completely without merit.

It is apparent that amicus relies upon the self-serving nature of defense-counsel's allegations at trial, without more, to substantiate her allegations of jury misconduct. However, the State represented, at the hearing on said new trial Motion, that the venire panel of which the subject juror was a member, may not have been asked about prior convictions or pending criminal charges. (AR, 13). Additionally, both the trial

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2 Although Respondent does not question the jurisdiction of this Court to consider this point, it should be noted that the Fourth District's apparent rejection of this point, by not addressing it in its opinion, indicate the outcome of this case, after review of the questions concerning guidelines, would not be affected by this point, Trushin v. State, 425 So.2d 1126 (Fla. 1982).

court and defense counsel agreed and conceded that, even if asked, said juror may have believed that his pending criminal charges or past convictions involved traffic violations, and would therefore not amount to misconduct, if in response to voir dire question concerning prior criminal convictions "other than a traffic ticket", (AR, 6-7). Furthermore, defense counsel also conceded that she could not represent to the court, in hindsight, that she would or would not have challenged said juror for cause, if his prior criminal record had been made known at voir dire. (AR, 10). In fact, the trial court suggested that if defense counsel had been made aware of such circumstances, Respondent may have chosen to specifically attempt to include the juror on the panel. (AR, 2-3). As the State further demonstrated, Respondent further failed to establish that the failure of said juror to disclose his criminal past (assuming arguendo this was misconduct), in any way substantially prejudiced Appellant. (AR, 13, 14, R, 547). It has been consistently held that a movant for new trial may not merely rely upon the allegation in the motion, but must establish Record proof and evidence of the truth of the matters in such Motion. Carr v. State, 174 So.2d 449 (Fla. 3rd DCA 1965); Young v. State, 140 So.2d 97 (Fla. 1962). Since there was no such Record evidence, there was obviously no prejudice to Appellant, and the motion was properly denied, based on the circumstances. Rule 3.600(3)(b), (3)(b)(4), Florida Rules of Criminal Procedure (1972); Jent v. State, 408 So.2d 1024, cert.denied, 457 U.S. 1111, 102 S.Ct 2916, 73 L.Ed.2d 1322 (1982); Baker v.

State, 336 So.2d 364 (Fla. 1976).

Furthermore, Respondent concedes that "the voir dire was not reported or transcribed". Brief of amicus curiae, at 25. Based on the lack of such a Record, there was no way for the trial court to determine whether juror Warman was asked specifically about prior convictions, other than rank speculation. Because no intelligent review of this point can therefore even be attempted by this Court, it should affirm. Brice v. State, 419 So.2d 749 (Fla. 2nd DCA 1982); Appelgate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979).

Thus, amicus' argument is reduced to a claim that, assuming arguendo juror Warman was unqualified, his inclusion on the jury amounted to per se prejudice to Respondent. However, as this Court has similarly ruled in a related case, nothing was demonstrated by Respondent, to indicate that Warman's impartial deliberations were affected by his circumstances. State v. Rodgers, 347 So.2d 610 (Fla. 1977). Finally, any speculation into the possibility that Warman's circumstances amounted to an effect on his deliberations, is not subject to attack, since such considerations "inhere in the verdict". Powell v. State, 414 So.2d 1095 (Fla. 5th DCA 1982); State v. Blasi, 411 So.2d 1320 (Fla. 2nd DCA 1981).

Accordingly, the trial court should be affirmed on this point. Jent, supra.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, and in its Initial Brief, Petitioner respectfully requests that this Honorable Court AFFIRM the judgment and sentence of the trial court, quash the opinion of the Fourth District, and remand with instructions to re-instate the trial court's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief has been mailed to KAREN A. MISCHLER, Respondent, P.O. Box 6101, Lake Worth, Florida 33461 (Respondent's apparent last known address), and to TATJANA OSTAPOFF, ESQUIRE, Amicus Curiae, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 18th day of February, 1985.

Richard G. Bartmon

Of Counsel