087

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : CASE NO. 66,257

BRIAN ANTHONY YOUNG, :

Respondent. :

_____ :

BRIEF OF RESPONDENT ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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Respondent.	:	
	:	

I PRELIMINARY STATEMENT

Brian Anthony Young, the defendant and appellant in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), referred to herein as Respondent. The State of Florida, the prosecution and appellee below, will be referred to herein as Petitioner.

The Record on Appeal consists of four consecutively numbered, bound volumes containing relevant pleadings, documents, and transcripts of proceedings. Citations to the record will be indicated parenthetically as "R", with the appropriate page number(s). Citations to the Supplemental Record on Appeal will be indicated parenthetically as "SR", with the appropriate page numbers.

II STATEMENT OF THE CASE AND FACTS

Respondent, for the purpose of resolving the issue herein, accepts as accurate Petitioner's Statement of the Case and Facts. However, it should be noted that the guidelines form lists three written reasons given by the trial judge for departure from the guidelines:

1. The defendant is an amoral person and a career criminal who should be segregated from society.

2. The defendant was charged with 11 additional felonies but the score sheet only allows points for four additional offenses at conviction.

3. The score sheet does not take into consideration the 27 other felony charges against defendant pending in the state attorney's office.

During the sentencing hearing the trial judge enumerated five reasons for departure, three of which are essentially the same as appear in the written statement:

1. The state attorney would not file informations on 27 other felonies.

2. Charges are pending against defendant from other jurisdictions.

3. The defendant is immoral and acts without regard to the law or society.

4. The score sheet does not provide points for more than four additional felonies, which means he gets no points for 7 felonies he pled to.

5. The defendant needs mental health treatment.

(SR-2; R-296-298)

III ARGUMENT

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CRIM.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 RESENTENCING.

Respondent submits that the foregoing question should be as follows:

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R. CRIM.P. 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, THE CASE SHOULD BE REMANDED FOR RESENTENCING UNLESS IT IS CLEAR FROM THE RECORD THAT THE SENTENCING COURT WOULD HAVE IMPOSED THE SAME SENTENCE IN THE ABSENCE OF SUCH IMPERMISSIBLE REASONS.

In Petitioner's Brief On The Merits, Petitioner argues that, notwithstanding the presence of impermissible reasons, if the sentence is within the statutory parameters for the convicted offense, it should be affirmed. Petitioner's argument fails to respond to the question certified by the lower tribunal. Moreover, Petitioner's position embodies a *per se* rule that would effectively eliminate appellate review for guideline sentences that do not exceed the statutory parameters for the convicted offense.

Petitioner supports its position by arguing that it will leave intact the sentencing discretion of the trial judge. The implication of Petitioner's argument is that the trial judge will somehow not be unable to depart from the guidelines if Petitioner's position is not adopted. However, Petitioner has misconstrued the issue raised by the question certified by the lower tribunal, and that is the proper role of an appellate court in examining reasons given by a sentencing court for departure from the guidelines. If Petitioner's position is adopted, why give reasons for a departed sentence? and why have sentencing guidelines? In effect, Petitioner's position renders the sentencing guidelines a nullity.

Inasmuch as a trial court may, in an hypothetical sense, impose a sentence departing from the guidelines and thereafter cite a reasons for such departure that is impermissible, it would seem an impossible task for an appellate court to determine whether and to what extent the trial court was influenced by the impermissible reason in determining how much the sentence would deviate from the guidelines. Specifically, if a trial judge recites an impermissible reason as the basis for deviating from the guidelines, it is impossible to determine if such errow is harmless, regardless of whether there are permissible reasons. Rhetorically, did the recitation of such reason by the trial judge, however impermissible, result in an addition to the

departed sentence? and, if so, how much?

The above reasoning was employed by the First District Court of Appeals in Watts v. State, 410 So.2d 600 (1st DCA 1982). In Watts, the appellant appealed an order of the trial court revoking his probation based on a violation of Conditions 1, 2, 4, and 7. Id. at 601. However, the State produced no evidence at the probation revocation hearing concerning violation of Conditiion 4. Id. Subsequently, the State dismissed the charge that appellant violated Condition 4 of his probation. Id. The district court held that "a finding of a violation of that condition as reflected in the written order of revocation was errow." Id. The court further stated that "we are unable to determine, however, whether the trial judge would have revoked probation and imposed the same sentence without a violation of 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). Accordingly, although revocation of probation and departure from sentencing guidelines are entirely different areas of law, the principles of due process require analogous treatment.

The implicit issue here is whether the extent of departure from the guidelines should be subject to appellate review, or is

such appellate review limited solely to the initial decision to depart from the guidelines. Section 921.001(5), Florida Statutes (1983), provides that "the failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to Chapter 924." Admittedly, the above-referenced quote does not resolve the issue raised. It should be further noted, however, that Section 921.001(8) provides only three circumstances upon which a person convicted of a crime on or after October 1, 1983, or any other person sentenced pursuant to the guidelines, shall be released from incarceration. Moreover, none of the three circumstances provide for review by the Parole and Probation Commission (See, Section 921.001(8)(a)(b) and (c)). In fact, Section 921.001(8) states unequivocably that "the provisions of Chapter 947 shall not be applied to such person." Accordingly, if the length of departed sentences is not subject to appellate review, then the very purpose of the guidelines, including the scoring procedure with its goal of eliminating subjectivity and unwarranted variation in the sentencing process (See Rule 3.701(b), Florida Rules of Criminal Procedure), shall have been frustrated. Furthermore, to hold that the presence of impermissible reasons is irrelevant to the length of sentence imposed is the same as applying the harmless errow rule to the use of such reasons, which, as

discussed above, would seem to be an impossible task for an appellate court.

Minnesota has sentencing guidelines (See Minn. State Ann., Ch. 244, app.), and the decisions of the Minnesota Supreme Court support the position that the presence of impermissible reasons is relevant to the length of departed sentences. In State v. Norton, 328 N.W. 2d 142 (Minn. 1982), the defendant was convicted of kidnapping, and the trial court subsequently imposed a sentence that was three times the presumptive sentence under the guidelines. Id. at 144. In reviewing and subsequently affirming the sentence, 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 presump-

> tive 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 underminded.

See also, State v. Shiue, 326 N.W. 2d 648 (Minn. 1982); State v. Partlow, 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. Evans, 311 N.W. 2d 481 (Minn. 1981).

Although the above-discussed case, State v. Norton, as well as the above-cited case law, does not address the use of impermissible reasons, such case law clearly establishes the principle that the length of departed sentences must be subject to appellate review. It is Respondent's position that the use of impermissible reasons is relevant to the length of departed sentences and therefore should be subject to appellate review. Furthermore, the extent of such relevancy (or harm) should be determined by remanding the case for resentencing, unless it is clear from the record that the trial judge would have imposed the sentence in the absence of impermissible reasons.

The written reasons of the trial judge as originally provided on the scoresheets in the Record on Appeal are entirely illegible (See R-232, 238, 245, 253, 260, 266, and 273). After transcription, it is apparent that the trial judge provided five written reasons concerning his decision to deviate from the guidelines, none of which are clear and convincing permissi-

ble reasons (SR-2). The first reason given by the trial judge is that the Respondent's total background "shows he is an amoral person feeling he does not have to comply with the law." (SR-2) First, inasmuch as the Respondent's background has been considered in the basic guidelines scoring, it may not also be utilized as a basis for departure from the guidelines. Analogously, the principle that penal sanctions may not be increased by counting elements of prior criminal behavior more than once has been firmly established in the setting of a presumptive parole release date under Chapter 947, Florida Statutes. Specifically, a presumptive parole release date may not be increased for the same "factors" used in reaching the "salient factor score and severity of offense behavior category." Section 947.165, Florida Statutes (1983). Salient factor score means the "indices of the offender's present and prior criminal behavior related factors found by experience to be predictive in regard to parole outcome." Nord v. Florida Parole and Probation Commission, 417 So.2d 1176 (Fla. 1st DCA 1982). In Mattingly v. Florida Parole and Probation Commission, 417 So.2d 1162 (Fla. 1st DCA 1982), the Court held that the Commission's rules did not "permit additional aggravation for factors included in the definition of other convictions already used as aggravating elements."

Under the Minnesota sentencing guidelines, the Minnesota Supreme Court in State v. Brusven, 327 N.W. 2d 591 (Minn. 1982), stated:

> Ordinarily, it is inappropriate for the sentencing court to use as a basis for departure the same facts which are relied upon in determining the presumptive sentence.

In State v. Mangan, 328 N.W. 2d 147, 149 (Minn. 1983), the Court reiterated this rule:

> Generally, the sentencing court cannot rely on a defendant's criminal history as a ground for departure. The Sentencing Guidelines take one's history into account in determining whetheror not one has a criminal history score and, if so, what the score should be. Here defendant's criminal history was already taken into account in determining his criminal history score and there is no justification for concluding that a qualitative analysis of the history justifies using it as a ground for departure.

See also, State v. Johnson, 327 N.W. 2d 580 (Minn. 1982) (same); State v. Barnes, 313 N.W. 2d 1 (Minn. 1981) (defendant's prior conviction improper reason for departure since the guidelines had already taken that conviction into account). Since the Respondent's background has already been accounted for in determining the presumptive sentence, the trial court should not be allowed to deviate from the guidelines by reconsidering that same background.

The trial judge's first written reason as quoted above, as well as his fourth and fifth written reasons that "this

defendant will be a criminal all his life" and "the longer he is segregated from society the better" (SR-2), constitute highly subjective characterizations of appellant. Such subjectivity is inimical to the very purpose of the guidelines:

> 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 imporatnace in the sentencing decision.

Rule 3.701(b), Fla.R.Crim.P. Additionally, reasons for departure must be "clear and convincing," and since deviation from the guidelines is subject to appellate review, Rule 3.701(d)(11), Florida Rules of Criminal Procedure, and Section 921.001(5), Florida Statutes (1983), there must be an evidentiary basis to support such deviation by the trial judge. See, Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979); Eutsey v. State, 383 So.2d 219 (Fla. 1980); Abbott v. State, 421 So.2d 24 (Fla. 1st DCA 1982). Cf. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) (in the capital sentencing context, an aggravating circumstance must be proved by the evidence beyond a reasonable doubt before being considered by the judge). Since the trial judge's first, fourth, and fifth reasons are not supported by any evidence, and since they consist solely of a subjective evaluation, such reasons cannot serve as a basis for deviation.

Similarly, the trial judge's third and fourth reasons for deviating from the guidelines, namely that "the guidelines don't make provision for but four other felonies at sentencing" and "they further do not make provision for consideration of the 27 felonies the S/A did not file on" (SR-2), are totally inadequate as a basis for deviation. First, both statements constitute a disagreement with the guidelines rather than a reason for deviation. In State v. Bellanger, 304 N.W. 2d 382 (Minn. 1981), the Minnesota Supreme Court, in reducing an aggravated sentence to a guideline sentence, stated:

> Here, the trial court expressed the view that "there is a great deal too much made of regularlity and conformity in sentencing, and his belief that the presumptive sentence of 30 months in prison adopted by the Sentencing Guidelines for one who commits a simple robbery and has a criminal history score of 3 is too lenient. For that primary reason, the court departed from the presumptive sentence and imposed a 48-month prison term. General disagreement with the Guidelines or the legislative policy on which the Guidelines are based does not justify departure.

Id. at 283. Concerning the above-quoted fourth reason of the trial judge, it should be further noted that the committee note to paragraph 3.701 d.11., Fla.R.Crim.P., states that "the court is prohibited from considering offenses for which the offender has not been convicted."

For the foregoing reasons, Respondent contends that none of the trial judge's stated reasons constitute clear and convincing permissible reasons justifying departure from the recommended guideline sentence. Assuming, however, departure was justified, Respondent further maintains that his sentence must be reversed because departure here was so excessive. Respondent's presumptive sentence under the guidelines was 2½ to 3½ years, whereas the trial judge sentenced Respondent to 15 years, a departure 4 to 5 times Respondent's recommended sentence.

IV CONCLUSION

Respondent respectfully urges this Court to adopt the position of the majority in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), vacating Respondent's sentence and ordering a new sentence in accordance with Rule 3.701, Florida Rules of Criminal Procedure. Respondent further urges this Court to answer the certified question as follows:

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R. CRIM.P. 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, THE CASE SHOULD BE REMANDED FOR RESENTENCING UNLESS IT IS CLEAR FROM THE RECORD THAT THE SENTENCING COURT WOULD HAVE IMPOSED THE SAME SENTENCE IN THE ABSENCE OF SUCH IMPERMISSIBLE REASONS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Greg Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32301 and a copy mailed to appellant, Brian Anthony Young, #094605, Tomoka Correctional Institute, 3950 Tiger Bay Road, Daytona Beach, Florida, 32014, on this 22nd day of January, 1985.

Kenneth L. Hosford

KENNETH L. HOSFORD