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IN THE SUPREME COURT OF FLORIDA

ANICETO P. SANTIAGO,

Appellant,

-v-

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. AW-418

ON APPEAL FROM THE DISTRICT
COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

APPELLANT'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Appellant was arrested on January 31, 1983, in the city of Gulf Breeze, Florida, and charged by an Amended Information filed on May 19, 1983, with possession of LSD with the intent to sell. (T-1).

The Appellant, along with co-defendants, Francisco Curdeiro and Antonio Cacela, were tried by a jury on July 21, 1983, and found guilty as charged in the amended information. (T-2). The Court withheld ruling on defendants' Motion for Judgment of Acquittal, but later granted the motion, after hearing, as to Curdeiro and Cacela, but denied the motion as to Appellant.

The Court ordered a pre-sentence investigation and sentencing was set for October 17, 1983. The Court elected to continue the sentencing and Appellant was sentenced on December 8, 1983, to commitment to the Department of Corrections to be imprisoned for an indeterminate period of six months to three years. (T-37). Appellant was credited with 311 days time served. (T-38).

The Appellant, on October 17, 1983, filed an Election to Be Sentenced Under Sentencing Guidelines (T-3), citing Rule 3.701 of the Florida Rules of Criminal Procedure and made calculations as provided in form 3.988 of the rules indicating that Appellant accrued 42 points thereunder, and

the recommended sentencing range therefor is probation to 12 months imprisonment, a non-state prison sanction.

The State, likewise, prepared a guideline sheet, concurring with Appellant, reflecting a total of 42 points which is in the non-state prison sanction category. (T-22). The Assistant State Attorney recommended an adjudication of guilt and time served. He further stated no reasons on the record to depart from the guidelines and prepared no memorandum and made no argument concerning the constitutionality of the guidelines. The State concurred with the guidelines recommendation. (T-22).

The Court read into the record the Order (T-9-14 and T-24-35) attempting to justify a departure from the guidelines, then sentenced the Appellant to state prison in contravention of the recommendations of the guidelines and the State Attorney.

The Court sought to characterize Santa Rosa County as a rural, agricultural economy and culture to justify departure from the guidelines (T-33); however, the State stipulated that the City of Gulf Breeze, where the arrest occurred and where the LSD was allegedly possessed, is a municipality and urban, not rural. (T-40).

The trial court sought to declare the guidelines unconstitutional, but the Attorney General admitted error on

that issue and consequently the appellate court did not consider the constitutionality thereof.

However, the First District Court of Appeal concluded that "the trial judge's judicial notice of the character of the area and the harmful nature of LSD, compared to other Schdule I substances, was proper because these are matters uniquely within the trial judge's knowledge and expertise, and may appropriately guide the judge in exercising his sentencing discretion".

Accordingly, the sentence was affirmed and Appellant invoked the discretionary jurisdiction of this Court by timely filing a notice. Jurisdiction was accepted by Order entered on May 23, 1985.

ARGUMENT

ISSUE: DID THE FIRST DISTRICT COURT OF APPEAL ERR IN AFFIRMING THE TRIAL COURT'S DEPARTURE FROM THE SENTENCING GUIDELINES?

The Honorable trial judge entered a written Order and Explanation of Sentence (T-9-14) wherein he devoted a substantial portion thereof to a perceived unconstitutionality of the Sentencing Guidelines. Almost as an afterthought, two reasons were stated therein for departure from the guidelines, to-wit: (T-14)

> I find it necessary to consider factors relating to the instant offense, to wit: The nature and perceived dangers to the community and the community interest in deterring the possession with intent to sell Lysergic Acid Diethylamide in this judicial circuit, and for such reasons to impose a sentence in excess of the presumptive sentence set forth in the guidelines.

The trial court also stated (T-13) that "Community perception of fair and appropriate sentencing in any given case will often vary from one geographic area of the state to that in another".

The trial court sought to characterize Santa Rosa County as a rural, agricultural economy and culture in contrast to Dade County. (T-13). However, his reference above to the First Judicial Circuit includes Pensacola and Fort Walton Beach which are certainly not rural.

At the sentencing hearing, the Defense and the State stipulated that the place of the arrest, "Gulf Breeze, as a municipality, is urban, not rural". (T-40)

Likewise, at the sentencing hearing, the trial Court took judicial notice "that the drug problem is an especially significant problem in the community of Gulf Breeze where this arrest was made, and this Court is of the opinion that in order to deter that, it must exercise the option and the responsibility of disposing of this case with a prison sentence". It should be noted that the foregoing was not a part of the written statement delineating reasons for departure mandated by Rule 3.701 (d)(11) of the Florida Rules of Criminal Procedure.

The Court's pronouncement above was not a proper exercise of judicial notice since the "Gulf Breeze drug problem" does not fall within one of the matters which must be judicially noticed in Florida Statute 90.201; matters which may be judicially noticed under Section 202; was not requested by a party under Section 203; and the parties were not afforded reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed, when the court determines to take judicial notice upon its own motion under Section 204 of the evidence code.

The First District Court of Appeal, in affirming the trial court, chose to rephrase the trial court's "laundry list" and affirmed upon the judicial notice of the "character of the area" and the "harmful nature of LSD". The appellate court did not characterize those reasons as "clear and convincing", but referred instead to the trial court's sentencing discretion. The inability to characterize those reasons as clear and convincing may be explained by the interesting footnote in Steiner -v- State, 10 FLW 1261 (Fla. 4th DCA 1985) that, "Since the two expressions simply do not go together as a matter of the English language, there are those who say that a clear and convincing reason is like a green and purple horse: it's an interesting concept, but it can't exist."

Of course before and after the Amendment to subsection (d)(11), it provided that departures "should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence".

Rule 3.701(b)(6) provides that:

> While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

There have been a few attempts to define "clear and convincing reasons" since the terminology is not defined in the guidelines. Judge Dell in Slomowitz -v- Walker, 429 So.2d 797 (Fla. 4th DCA 1983) defined clear and convincing evidence as that which "will produce in the mind of the fact finder a firm belief or conviction as to the truth of the facts sought to be established".

In Mischler -v- State, 458 So.2d 37 (Fla. 4th DCA 1984) it was observed that

> Clear and convincing reasons for departure have been held in Florida to include violation of probation, repeated criminal convictions, crime "sprees" or "binges", "career" of crime, extraordinary mental or physical distress inflicted on the victim, and extreme risk to citizens and law enforcement officers. We ask ourselves: What do all these reasons have in common? The answer appears to be an excess of crime which either results in repetitive convictions, successive probation violations which decry the likelihood of rehabilitation or unusual physical or psychological trauma to the victim. To that, we now add crimes committed in a repugnant and odious manner.

Applying the definitions above, the Court in Knowlton -v- State, 10 FLW 457 (Fla. 4th DCA 1985) found that planning a robbery in advance, binding, gagging and taking over $10,000.00 from a 63 year old victim were not "clear and convincing" reasons to depart from the guidelines. The fact in the instant case are much less egregious than those

in Knowlton and State -v- Thomas, 461 So.2d 234 (Fla. 1st DCA 1984) where the reasons were not clear and convincing.

However phrased, the appellate court's reference to the trial court's judicial notice of the "character of the area" must be characterized as "deterrence" because of the trial court's statement (T-35-36) concerning the drug problem in "Gulf Breeze where the arrest was made, and this Court is of the opinion that in order to deter that that it must exercise the option and responsibility of disposing of this case with a prison sentence".

The use of "deterrence" as a reason for departure is condemned in Davis -v- State, 458 So.2d 42 (Fla. 4th DCA 1984) and in Williams -v- State 462 So.2d 23 (Fla. 4th DCA 1984) where the Court succinctly noted:

> The trial judge may not depart from the guidelines because a harsher sentence will act as a "deterrent to others." 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.

Another footnote in Steiner, supra, reinforces the argument on deterrence and points out the anomaly of the First District Court of Appeal's decision below:

> The first paragraph of the sentencing order refers also to the court's interest in deterring future such conduct especially in a resort area like Monroe County. We consider that since (a) deterrence is a basic objective of the process which must be considered in making every sentencing decision, including the formulation of the guidelines, In Re Rules of Criminal Procedure, 439 So.2d 849 (Fla. 1983), and (b) one of their primary objectives is to achieve state wide uniformity in sentences which should not therefore vary according to the interests of the particular area involved, both of these factors are subsumed in the guidelines and neither, under the first part of our test, is therefore an appropriate basis for deviation. But see Santiago -v- State, 459 So.2d 468 (Fla. 1st DCA 1984).

The other basis for departure, relied upon in the opinion of the First District Court of Appeal is "the harmful nature of LSD, compared to other Schedule I substances." Again, the nature of LSD is not properly the subject of judicial notice under the evidence code and neither the trial court, nor any part of the judiciary is authorized to override the legislature in determining the characteristics nor the effects of illicit drugs. The legislature has chosen to characterize LSD as a Schedule I substance and the Court is not authorized to override that characterization by judicial notice or fiat.

Furthermore, it is irrefutable that the drug LSD and its nature and characteristics are matters "relating to the

instant offense" and "inherent components of the crime". It is inconceivable that one could commit the crime for which Appellant was convicted without the possession of Lysergic Acid Diethylamide.

The crime was allegedly committed on January 31, 1983. Appellant was convicted by a jury on July 21, 1983, and sentencing was set for October 17, 1983. On that date, Appellant filed an election to be sentenced under the Sentencing Guidelines. The Court continued the Sentencing Hearing and Appellant remained incarcerated in the Santa Rosa County Jail until December 8, 1983, when the Court imposed the sentence appealed from.

Rule 3.701(d)(11) of the Florida Rules of Criminal Procedure which became effective on October 1, 1983, and affirmatively selected by the Appellant pursuant to this Court's opinion at 439 So.2d 848, was the following:

> Departures from the guidelines sentence: Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

On May 3, 1984, this Court adopted an Amendment to Rules of Criminal Procedure 3.701, Sentencing Guidelines at 451 So.2d 824. Subsection (d)(11) was amended to provide:

> Departures from the guideline sentence: Departures from the guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.

As noted by the Mischler court:

> The trouble with the sentencing guidelines is that they themselves need guidelines. By every definition, guidelines are not mandatory and in Florida they specifically disavow any intention to "usurp judicial discretion" and provide that the trial court can depart from them for "clear and convincing" reasons. However, we note a paradox in the former guidelines [Florida Rule of Criminal Procedure 3.701(d)(11)] which contained the phrase: "Reasons for deviating from the guidelines shall not include factors relating to ... instant offense" what did that mean? There is no doubt it must have meant something because the Supreme Court removed the words "instant offense" and substitued "factors relating to prior arrests without conviction" in the latest amendment adopted May 8th, 1984. In a well worded dissent, Judge Ervin of the First District suggests that this phrase, and others, precluded the

trial judge from taking other factors into account (see Manning -v- State, 452 So.2d 136 (Fla. 1st DCA 1984)

Although, arguably, the court may, after the Amendment, be allowed to consider matters relating to the instant offense, if convicted, Appellant was sentenced prior to the adoption of the Amendment and maintained in his brief below that application of the language in the Amendment would be ex post facto and unconstitutional pursuant to Article I, Section 9 of the United States Constitution, Article I Section 10 of the Florida Constitution and also see Weaver -v- Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 17 (1981).

Appellant's position on the ex post facto application is supported by Carter -v- State, 452 So.2d 953 (Fla. 5th DCA 1984), Jackson -v- State, 454 So.2d 691 (Fla. 1st DCA 1984), Moore -v- State, 10 FLW 1338 (Fla. 5th DCA 1985) and Hopper -v- State, 10 FLW 492 (Fla. 2nd DCA 1985), wherein the court stated that "the fact that the guidelines are going to be amended in the future is not a valid reason for departure".

In Callaghan -v- State, 10 FLW 8 (Fla. 4th DCA 1985), the court determined that:

Rule 3.701(d)(11) provides in pertinent part that the court should not deviate from the guidelines for reasons that include factors relating to the instant offense or

prior arrests for which convictions have not been obtained. Furthermore, we hold that the court is not at liberty to aggravate a sentence by using elements which go to make up the crime for which the defendant is being sentenced.

In accord with Callaghan is Fletcher -v- State, 9 FLW 41 (Fla. 5th DCA 1984) wherein the trial court aggravated the sentence based upon the inference that the defendant was a "regular street prostitute", based upon facts learned by the trial judge at trial "relating to the instant offense". The Fletcher court therefore reversed the trial court's departure from the sentencing guidelines.

Similarly, the court in Baker -v- State 10 FLW 852 (Fla. 3rd DCA 1985) employed the inherent component test and determined that the use of a gun, an inherent component of robbery with a deadly weapon, constituted an inherent component and that "It is well established that an inherent component of the crime, being already built into the guideline range will not justify a guideline departure". The Baker court cited Bowdoin -v- State, 464 So.2d 597 (Fla. 1st DCA 1985) and Carney -v- State, 458 So.2d 13 (Fla. 1st DCA 1984) as authority for the inherent component theory. The Court in Steiner -v- State, supra cited the Baker decision, to-wit: "Because, by definition, these elements are computed into the guidelines recommendations

themselves, a reason which will support departure must not be an inherent component of the crime in question."

Although the District Court of Appeal substantially pared the trial court's "check list" of reasons for departure from the guidelines, there was no determination made as to whether either of the appeal court's reasons, standing alone, would be substantial enough to support a deviation from the guidelines.

It is, of course, appellant's position that neither the "character of the area" nor the "harmful nature of LSD" rationale advanced by the First District Court of Appeal is a sufficient basis for departure. However, it is necessary, arguendo, to assume the validity of one of the reasons for departure as opposed to the invalidity of the other reasons set out by the courts.

Carney -v- State, 458 So.2d 13, (Fla. 1st DCA) and Young -v- State, 455 So.2d 551 (Fla. 1st DCA 1984) are examples of cases where only one of several reasons stated by the trial court were determined to be sufficient for departure, the sentences were reversed and remanded and the question of the validity of the sentence certified to this Court.

Thus, even assuming arguendo that this Court should determine one of the stated grounds for departure to be

valid, it may still be necessary to remand for re-sentencing since an appellate court may not determine whether one reason for departure, standing alone, would be sufficient for a trial court to aggravate a sentence when the other reasons cited by the trial court are deemed impermissible by an appellate court.

There appear to be no Florida decisions relating to departure because of the characteristics of a drug or illegal substances. However, there are several cases dealing with the quantity of drugs in the possession of the defendant. The most remarkable of them is Banzo -v- State, 464 So.2d 621 (Fla. 2nd DCA 1985). In that case, Judge Coe departed from the guidelines, citing the Defendant's possession of approximately 1,000 grams of cocaine and his failure to cooperate with law enforcement as reasons for the departure. The Second District Court of Appeal reversed, holding that defendant's alleged possession or delivery of 1,000 grams of cocaine was not a proper basis from the recommended guideline sentence.

SUMMARY OF ARGUMENT

Appellant was convicted by a jury of possession of LSD, a third degree felony. The trial court departed from the guidelines which call for a non-state prison sanction, ignored the recommendation of the state attorney that Appellant be sentenced to time served, and imposed an indeterminate sentence of six months to three years in state prison. Appellant was credited with 311 days for his time served.

The trial court detailed four reasons for departure in his written explanation which was primarily aimed at declaring the sentencing guidelines unconstitutional. The Attorney General admitted the constitutionality of the guidelines and the First District Court of Appeal focused only on the reasons for departure. The First District affirmed the trial court's departure, citing the judicial notice of the "character of the area" and "the harmful nature of "LSD" as valid reasons for aggravation of the sentence.

The trial court improperly took judicial notice of the "drug problem in Gulf Breeze" contrary to any provisions of the evidence code, and further acknowledged that he departed from the guidelines in order to deter that drug problem.

The Courts appear to be in agreement that deterrence is not a valid reason for departure and that deterrence and consideration of the characteristics of a certain geographic area are subsumed in the guidelines and are not an appropriate basis for deviation.

The Court's reliance on "the harmful nature of LSD" compared to other Schedule I substances is misplaced because LSD is a "factor relating to the instant offense" and an "inherent" component of the crime.

Appellant was sentenced pursuant to his written election under the original guidelines which became effective October 1, 1983. Those guidelines forbade consideration of "factors relating to the instant offense" when determining "clear and convincing" reasons for departure. Although the verbage of subsection (d)(11) was substantially reworded in the Amended Guidelines, to apply the Amended Guidelines would be ex post facto and a retroactive application which has been forbidden in several decisions.

Even if this Court should find one of the reasons set out below as a sufficient reason for departure, it would be necessary to remand for re-sentencing because an appellate court cannot determine whether the trial court would have aggravated the sentence on the basis of that reason alone.

There are no opinions concerning departure due to the characteristics of a drug in Florida except the opinion of the District Court below. However, the quantity of drugs have been considered and determined to be an invalid reason by at least one court.

This court is urged to apply the plain meaning of the language in the original guidelines prohibiting reliance on "factors relating to the instant offense" and to find that consideration of the characteristics of LSD is an impermissible reason for deviation since it is a "factor relating to the instant offense" and an "inherent component" of the crime.

Furthermore, the Court should find that consideration of the "character of the area" relates to "deterrence" which is not a clear and convincing reason to depart from the guidelines.

The Court is urged to follow the reasoning of the Fourth District Court of Appeal in Mischler, Williams and Callaghan, supra and to dissaprove the concept advanced by the Second District Court of Appeal in Addison -v- State, 452 So.2d 955 (Fla. 2nd DCA 1984) which would allow the trial court so much discretion that the sentencing guidelines would be rendered completely ineffective.

CONCLUSION

Appellant prays that this Honorable Court will reverse the decision of the First District Court of Appeal and remand to the trial court with directions to resentence the Appellant to a non-state prison sanction as provided for in the sentencing guidelines.

Respectfully submitted,

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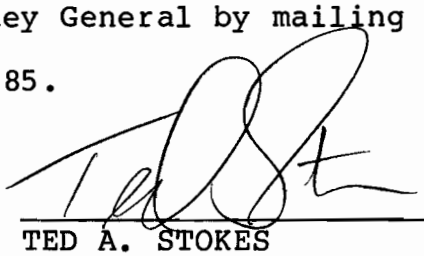
CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof was furnished to Gregory C. Smith, Assistant Attorney General by mailing the same this 14 day of June, 1985.



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