

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

vs.

GEORGE W. BURCH,  
Respondent.

CASE NO. 66,471

**FILED**

SID J. WHITE

FEB 18 1985

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By [Signature]  
Chief Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

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vs.

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PRELIMINARY STATEMENT

Petitioner, State of Florida, was the prosecution in the trial court and Appellee in the First District Court of Appeal and will be referred to in this cause as "State".

Respondent, George W. Burch, was the defendant in the trial court and Appellant in the First District Court of Appeal and will be referred to in this cause as "Respondent".

The one volume of the record on appeal is consecutively numbered and will be referred to by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

On January 4, 1984 Respondent was adjudicated guilty of one count of burglary of a structure and one count of grand theft. A guidelines scoresheet was prepared under Fla.R.Crim.P. 3.988 which indicated a guidelines range of 12 to 30 months incarceration. The sentencing judge gave the following written explication of his basis for departing from the guidelines and sentencing Respondent to five years incarceration:

(1) No pretense of moral or legal justification for the offense.

(2) In need of rehabilitative treatment that can best be provided by commitment to a penal facility .

(3) Prior history of unsuccessful alternatives to commitment in a penal facility; i.e., previous revocation of probation:

(4) On parole at the time of the present offense. (R 84).

On January 11, 1985 the First District Court of Appeal vacated the sentence and remanded for reconsideration in light of their holding that three of the four reasons for departing from the guidelines range were less than clear and convincing or had already been scored and not a basis for departure. The court certified the following question to be one of great public importance:

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT HAS RELIED ON ONE OR MORE IMPERMISSIBLE REASONS FOR DEPARTING FROM THE SENTENCING GUIDELINES, AND HAS ALSO RELIED ON ONE OR MORE PERMISSIBLE REASONS, MAY THE APPELLATE COURT APPLY THE HARMLESS ERROR RULE AND AFFIRM THE SENTENCE?

On January 24, 1985 Petitioner timely filed a motion to invoke discretionary jurisdiction of this Court.

## SUMMARY OF ARGUMENT

The State is arguing that the traditional sentencing discretion of the judge has not been replaced by the sentencing guidelines which allow a judge to depart from the guidelines range for clear and convincing reasons. The trial court below gave a clear and convincing reason which was found to be clear and convincing by the court below. The clear and convincing reason given below did not include factors relating to either the instant offense or prior arrests for which convictions have not been obtained.

Secondly the State submits that the proper standard of review in guidelines cases is whether the trial court's departure constitutes an abuse of discretion. This position has been endorsed by other district courts of appeal and the court below. Furthermore, there is a well established principle that if a trial judge's judgment or decree is sustainable under any theory revealed by the record on appeal the judgment or decree will be affirmed by the appellate court.

There is no language in the guidelines themselves or the enabling legislation which provides for appellate review of the extent of the departure and any sentence within the parameters set by general law should be affirmed.



ARGUMENT

QUESTION PRESENTED

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT HAS RELIED ON ONE OR MORE IMPERMISSIBLE REASONS FOR DEPARTING FROM THE SENTENCING GUIDELINES, AND HAS ALSO RELIED ON ONE OR MORE PERMISSIBLE REASONS, MAY THE APPELLATE COURT APPLY THE HARMLESS ERROR RULE AND AFFIRM.

Petitioner submits that the foregoing question should be answered as follows:

WHEN A TRIAL COURT PROVIDES AT LEAST ONE CLEAR AND CONVINCING REASON FOR DEPARTING FROM THE GUIDELINES RANGE AND THE SENTENCE IMPOSED IS LAWFUL, THIS SENTENCE MUST BE AFFIRMED.

This position leaves intact inherent sentencing discretion of the trial judge as narrowly modified by the sentencing guidelines without limiting the defendant's express right to appellate review of guideline range departures as provided for by §921.001 (5), Florida Statutes. This does not present a question of harmless error because nowhere in Fla.R.Crim.P. 3.701(b)(6) does it state that all written reasons must be clear and convincing. The rule only requires that clear and convincing reasons be given. The obvious import of this disposition would have been revealed more dramatically had the trial court provided only one reason for departing, the permissible one. The certified question would then be limited to whether a trial court must give more than one clear and convincing reason for departing from the

guidelines which is, in the final analysis, the question before this Court. This Court's task is therefore to determine what constitutes clear and convincing reasons for departure and what standard of review applies in sentencing guidelines cases.

In Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), the court held that: "the only limitation on reasons for deviating from the guidelines is found in subsection (d)(11) which reads: 'reasons for deviating from the guidelines shall not include factors relating to either instant offenses or prior arrests for which convictions have not been obtained.'" Id. at 1028. Similarly, the lower tribunal, in rejecting the argument that the nature of the offense can not be considered for purposes of departure held:

However, both the dramatical language and the logical import of the quoted rule [rule 3.701 (d)(11)] would appear to preclude deviation only when predicated upon factors, related to either prior arrests or the instant offense, for which conviction has not been obtained.

\* \* \*

In the present case the trial court's express reason for deviating from the guidelines is supported by the temporal and geographical circumstances of the offenses for which appellants were convicted, each appellant being convicted of multiple contemporaneous offenses amply substantiating the court's reference to a "crime binge" two-man crime wave." Rule 3.701(d)(11) therefore does not preclude such deviating, and the trial court did not err in so deviating for the reasons stated.

Manning v. State, 452 So.2d 136, 138 (Fla. 1st DCA 1984).

See also Garcia v. State, 454 So.2d 715, 718 (Fla. 1st DCA 1984). The foregoing decisions of the First and Second Districts

are consistent with the views expressed by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) where the court recognized that in discharging his duty of imposing a proper sentence, the trial judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime, and the trial judge's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant, if not essential to the selection of an appropriate sentence where sentencing discretion is granted. (Emphasis added). Id at 57 L.Ed.2d 988, 989. See also United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582, 591, 592 (1978).

Consequently, Petitioner maintains that for purposes of departure, the trial court may consider and rely upon any factor, concerning the nature and circumstances of the offense as well as the defendant's background which is now precluded from consideration by Fla.R.Crim.P. 3.701(d)(11).

In view of the sentencing commission's stated intention that the guidelines are not meant to usurp judicial discretion, Fla.R.Crim.P. 3.701(b)(6), Petitioner submits that the proper standard of review in guidelines cases is whether the trial court's departure constitutes an abuse of discretion. Put simply, before departure from the sentencing guidelines can be reversed on appeal, there must be a clear demonstration of an abuse of discretion by the trial judge.

Judicial discretion, in this sense, having been defined as the power exercised by course to determine questions to which no strict rule of law is applicable, but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court, Hair v. Hair, 402 So.2d 1201, 1204 (Fla. 5th DCA 1981), petition for review denied, 412 So.2d 465 (Fla. 1982), is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it can not be said that the trial court abused its discretion. Hair v. Hair, supra, at 1204, citing with approval Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

Some of the district courts, including the lower court, have endorsed and applied this suggested standard holding:

While a defendant may appeal a sentence outside the guidelines, it is not the function of this court to reevaluate the exercise of the trial judge's discretion in this area. Rather, our role is to assure that there is no abuse of that discretion. Addison v. State, 452 So.2d 955, 956 (Fla. 2d DCA 1984).

Decisions from our sister courts show that we are in accord in our views that the trial courts continue to have the same broad sentencing discretion conferred upon them under the general law, subject only to certain limitations or conditions imposed by the guidelines, which are to be narrowly construed so as to encroach as little as possible on the sentencing judge's discretion,

but whose specific directives we are required to recognize and enforce in a manner consistent with the guidelines' stated goals and purposes.

\* \* \*

In the final analysis, we reject the notion, implicit in this in the amounting deluge of guidelines appeals, that there reposes in the language of the guidelines, either in the "clear and convincing reasons" terminology or elsewhere, a set of sentencing departure absolutes only awaiting the proper occasion for the appellate courts to reveal them on a case-by-case basis. Rather, the guidelines are for the guidance of the trial court, as on the face thereof they are represented to be, and the appellate court's function is simply to enforce their proper application and to review departures by the trial courts to determine if there has been an abuse of discretion warranting reversal. Garcia v. State, 454 So.2d 714, 717, 718 (Fla. 1st DCA 1984). See also Higgs v. State, 455 So.2d 451, 453 (Fla. 5th DCA 1984).

Petitioner notes that the sentencing commission deliberately omitted a laundry list of approved clear and convincing reasons and submits that this is consistent with the United States Supreme Court's decision in Lockett v. Ohio, supra, wherein the court recognized the trial judge should be at liberty to consider all the information relevant to his sentencing decision. Equally consistent with Lockett, supra, was the lower court's decision in Santiago v. State, 9 F.L.W. 2479 (Fla. 1st DCA Nov. 28, 1984), where the court recognized the role of judicial notice in sentencing proceedings holding:

In reviewing the instant, we apply the standard set forth in Addison v. State, supra, and find that the trial court did not abuse its sentencing discretion by departing from the guidelines. We conclude that the trial judge's judicial

notice of the character of the area and the harmful nature of LSD, compared to other Schedule I substances was proper because these manners are uniquely within the trial judge's knowledge and expertise, and may appropriately guide the judge in exercising his sentencing discretion. To hold otherwise, in our view, would tend to reduce a trial judge to whom is entrusted probably the most weighty responsibilities of any public official in the local community in other areas--to a mere automation in sentencing matters. This we decline to do.

Id at 9 F.L.W. 2479. See also Albritton v. State, 9 F.L.W. 2088 (Fla. 5th DCA Sept. 27, 1984) and Murphy v. State, 9 F.L.W. 2230 (Fla. 5th DCA Oct. 18, 1984), where the court applied the abuse of discretion standard.

Accordingly, where there is fair support in the record for one or more rational reasons advanced by the trial judge as a basis for imposition of a sentence outside the guidelines recommended range, it cannot be said that the trial judge, in departing, abused his discretion and the cause should therefore be affirmed. This proposition is nothing more than recognition of the well established principle if a trial judge's order, judgment or decree is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been bottomed on an erroneous theory, an erroneous reason, or an erroneous ground, the order, judgment or decree will be affirmed. Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963). See also Martin v. State, 411 So.2d 987, 989 (Fla. 4th DCA 1982).

This reasoning has been employed by the lower court and other district courts to uphold departures where the trial court

relied upon permissible as well as impermissible reasons for departure in other cases. See Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984); Swain v. State, 9 F.L.W. 1820 (Fla. 1st DCA Aug. 22, 1984); Mitchell v. State, 9 F.L.W. 2107 (Fla. 1st DCA Oct. 2, 1984); Webster v. State, 9 F.L.W. 2419 (Fla. 2d DCA Nov. 14, 1984); Albritton v. State, supra; Higgs v. State, supra.

Particularly noteworthy and consistent with Petitioner's position, are the decisions of the Fifth District in Albritton and the Second District in Webster. In Albritton v. State, supra, the court reasoned:

The defendant also argues where some of the reasons given by the trial judge for departure are inadequate or impermissible and other reasons given are authorized and valid reasons this court should not merely affirm but must remand for the trial court to reconsider the matter and determine if it would depart solely on the basis of the good reasons given. We do not agree. 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. 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 days after receipt of an appellate mandate affirming the sentence on appeal. (Footnotes omitted) (Emphasis added).

Id at 9 F.L.W. 2088, 2089. Similarly, the court in Webster v. State, supra, held:

. . . a sentence departing from the guidelines can be upheld on appeal where supported by any valid clear and convincing reasons even though other improper reasons may be included. It is unnecessary to remand for resentencing, and the judgment and sentence are therefore affirmed. (Emphasis added).

Id at 9 F.L.W. 2419.

Thus, when a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense, the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons. To hold otherwise would inhibit the listing of all reasons considered by the trial judge to constitute a bona fide basis for departure in the particular case and have the undesired effect of compelling the trial judge to search for and list only those reasons enjoying judicial approval in an effort to insure that his sentencing decision will withstand appellate scrutiny. This result would make a mockery of the guidelines and assign the highest priority to form rather than substance.

Petitioner notes that the lower court in reversing the instant case, evidently relied in part upon reasoning set forth in its opinion in Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984). There the court declined to adopt a per se rule of reversal in every instance in which permissible and impermissible



reasons for departure are stated by the trial judge and held:

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 sentencing 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.

Petitioner urges this Court to reject the ruling announcing Carney and the lower court's application thereof in the instant case because the statutorily required "weighing process" involved in capital cases, Florida Statutes §921.141, is not mandated by either Florida Statutes §921.001 or Fla.R.Crim.P. 3.701.

The sentencing guidelines are meant to aid the judge in his sentencing decision. If by "clear and convincing reasons" the judge, in his discretion, departs from the recommended guidelines sentence range, he may do so when the reasons are articulated in writing and supported by the record. Only the judge's discretion is involved in that standard used by the judge in exercising his discretion is less strict than in death cases. By comparison, in death penalty cases, the judge conducts a "weighing process" of the statutory aggravating circumstances proved "beyond a reasonable doubt" with the statutory and non-statutory mitigating factors

presented by the defendant. In those cases where there are no mitigating circumstances or only a relatively minor mitigating circumstance such as the age of the defendant, this Court has upheld the sentence of death, if, after disregarding the invalid aggravating circumstances, there remained at least one valid aggravating circumstance. See Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied, 454 U.S. 1022 (1981); Booker v. State, 397 So.2d 910 (Fla. 1981); Rose v. State, 9 F.L.W. 515 (Fla. December 6, 1984). This Court has noted that even in death cases it is within the trial judge's discretion to decide in each case whether a particular mitigating circumstance was proved and weight to be given. See Lemon v. State, 9 F.L.W. 308 (Fla. 1984); Dougherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). Only in those cases where aggravating as well as substantive mitigating circumstances present in this Court finds some of the aggravating circumstances invalid, does the case sometimes get remanded for resentencing. See Booker, supra, Basset v. State, 449 So.2d 803 (Fla. 1984). The purpose of the remand is to allow the trial judge an opportunity to "reweigh" the remaining valid aggravating circumstances with mitigating ones.

Therefore it is abundantly clear that one cannot compare the sentencing "discretion of a judge in a non-death sentencing guidelines case with the "weighing process" involved in death penalty cases. This is especially so in light of the absence of a mandated weighing process in either the enabling legislation

or the guidelines themselves. Thus Petitioner submits that where the trial judge has set forth at least one permissible reason for departure, the presence of one or more impermissible reasons should not militate against affirmance.

In Albritton v. State, supra, the Court recognized that 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. Id at 9 F.L.W. 2089. Subsequently, in Whitlock v. State, 9 F.L.W. 2390 (Fla. 5th DCA Nov. 15, 1984), the trial court departed from the presumptive sentence and imposed a sentence of five years imprisonment. The Fifth District found the reasons given by the trial court justified departure and affirmed holding:

Once there exists clear and convincing reasons to depart from the guidelines, we do not think the appellate courts have jurisdiction to review the extent of departure, so long as the length of the sentence is one permissible under the criminal statutes. Since Whitlock's crime for which he was convicted carries a maximum sentence of five years, we must affirm.

Id. at 9 F.L.W. 2390.

Similarly the Respondent, the defendant below, was adjudicated guilty of a felony in the third degree and given a term of imprisonment of five years in compliance with §775.082(3)(d).

Furthermore, the absence of provision for appellate review of the extent of departure where the legislature specifically provided for appellate review of the propriety of departure, Florida Statutes §921.001(5), serves a clear indication that the legislature intended that the trial court's exercise of its

inherent sentencing discretion should remain inviolate in terms of appellate interference, once a departing sentence had been determined to have been imposed in conformity with requirements of Fla.R.Crim.P. 3.701. Petitioner therefore contends that although Florida Statutes §921.001(5) and §924.006 (e) provide for appellate review of sentences imposed without the guidelines range, if properly preserved, such review must necessarily be limited to evaluation of the trial court's conformity to the procedures for departure pursuant to Fla.R.Crim.P. 3.701, and should not be extended to matters which have been consistently held to be not subject to appellate review. In sum, once a valid reason for departure has been found, appellate inquiry ceases. Finally Petitioner submits that the trial judge's finding that the Respondent demonstrated no pretense of moral or legal justification for the commission of the offense should have been upheld by the lower court as a clear and convincing reason for departure. The lower court's finding that consideration of this factor was inappropriate simply cannot stand in view of the fact that the absence of moral or legal justification has been recognized as an element of an aggravating factor in capital cases. Florida Statutes §921.141(5)(i). Cf. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); O'Callaghan v. State, 429 So.2d 691 (Fla. 1983). Also the need for rehabilitative treatment afforded by a penal facility has been recognized as the valid reasons for departure, Higgs v. State, supra, and is consistent with the United States Supreme Court's decision in Lockett v. Ohio, supra,

and the legislature's recognition that such factor may be properly considered by the trial judge in sentencing. See Florida Statutes §921.005.

#### CONCLUSION

This Court, in answering the question certified by the lower tribunal must necessarily determine what constitutes clear and convincing reasons for departure and what standard of review should be applied to sentencing guidelines cases.

Petitioner contends that for purposes of departure, the trial court may consider and rely upon any factor, concerning the nature and circumstances of the offense as well as the defendant's background, which is not precluded from consideration by Fla.R.Crim.P. 3.701(d)(11).

Petitioner maintains that the only proper standard of review is whether the trial court, in departing, abused its discretion. This is true especially in light of the stated purpose of the guidelines is to aid and not usurp the traditional discretion of the trial court. In applying this standard of review, a well established appellate principle as employed by the district courts of appeal dictates that where a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense, the sentence must affirmed notwithstanding the presence of one or more impermissible reasons.

Accordingly, the decision of the court below should be vacated, the conviction and sentence affirmed, and the certified question answered as follows:

WHEN A TRIAL JUDGE'S DEPARTURE FROM THE SENTENCING GUIDELINES IS PREDICATED UPON AT LEAST ONE CLEAR AND CONVINCING REASON AND THE SENTENCE IMPOSED IS WITHIN THE STATUTORY PARAMETERS FOR THE CONVICTED OFFENSE, THE SENTENCE MUST BE AFFIRMED NOTWITHSTANDING THE PRESENCE OF ONE OR MORE IMPERMISSIBLE REASONS.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 18th day of February, 1985.

  
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