IN THE SUPREME COURT OF FLORIDA

JAMES ARTHUR BRINSON, :

Petitioner, :

vs. : Case No: 66,624

STATE OF FLORIDA, :

Respondent. :

:

ON APPEAL OF THE DISTRICT COURT
OF APPEAL OF FLORIDA IN AND FOR THE SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, James Arthur Brinson, was the appellant in the Second District Court of Appeals and will be referred to as petitioner in this brief. The State of Florida was the appellee in the appeals court below and will be called respondent in this brief.

STATEMENT OF THE CASE AND FACTS

In March, 1984 Petitioner was charged by information with nine counts of armed robbery and one count of attempted armed robbery. He entered pleas of nolo contendere in the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida. The recommended guideline sentence was for 5 1/2 - 7 years.

At the urging of the State, petitioner's sentence was aggravated to 15 years. The trial judge gave the following written reasons.

1. Petitioner provided the firearm used by his co-defendant.
2. He received an equal share of proceeds, an unusually large amount of money.
3. He was persisted in his participation reflecting that he is a dangerous criminal.
4. Victims were placed in great fear.
5. Petitioner is an alcoholic and drug addict who supplied his habit from the robbery proceeds.

6. The lives of a number of people were placed in jeopardy.

7. Several victims will have psychological problems from the experience.

Petitioner appealed to the Second District Court of Appeals.

The district court affirmed stating there were five valid reasons to support departure. However, they certified the following question:

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 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 A DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING?

See Brinson v. State, 463 So.2d 564 (Fla. 2d DCA 1985).

This discretionary proceeding followed.

SUMMARY OF ARGUMENT

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.

Based on recent decisions of the district courts, Weems v. State, infra, Manning v. State, infra, and Garcia v. State, infra, The United States Supreme Court's decisions in Lockett v. Ohio, infra, and United States v. Grayson, infra, and the proscriptions found in Fla.R.Crim.P. 3.701, Respondent 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).

Since the sentencing function has been traditionally recognized as an area where the trial courts exercise discretion which, until the advent of the guidelines, was almost wholly unbridled, Respondent maintains that the only proper standard of review is whether the trial court, in departing, abused its discretion. Addison v. State, infra; Garcia v. State, infra; Higgs v. State, infra; Albritton v. State, infra. In applying this standard of review, a well established appellate principle, which has been employed in substance in recent guidelines cases decided by the district courts, Swain v. State, Mitchell v. State, infra, Webster v. State, infra,

Albritton v. State, infra, and Higgs v. State, infra, 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 be affirmed notwithstanding the presence of one or more impermissible reasons.

ARGUMENT

The answer to the certified should be:

> 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 REASON.

Rule 3.701(d)(11), Florida Rules of Criminal Procedure, indicates departures from the sentencing guidelines should be for "clear and convincing" reasons. The only limitations on these reasons are factors relating to past or present offenses where no conviction was obtained. By adopting the above answer, this Court will leave intact the inherent sentencing discretion of the trial judge.

The district courts of this State have recognized the sentencing guidelines are designed to aid the sentencing court in carrying out its functions. However the ultimate determination is still within the sound discretion of the trial judge. In Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984) the district court said:

> The purpose of the sentencing guidelines is to promote more uniformity in sentencing without usurping judicial discretion. While it was contemplated that most sentences would fall within the guidelines, it was also anticipated that from 15 to 20 per cent of the sentencing decisions routinely would fall outside the recommended range. To prevent an abuse of discretion, provision was made for ap-

> pellate review of the reasons given for departing from the guidelines. Florida Rules of Criminal Procedure 3.701(d)(11).

Accord, Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984); Addison v. State, 452 So.2d 955 (Fla. 2d DCA); Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984). The rule itself. Rule 3.701(b)(6), states the guidelines are not intented to usurp judicial discretion.

Answering the question certified requires a determination of what is a clear and convincing reason and what is the standard of review applicable to sentencing guideline cases. Respondent submits the proper standard of review should be in conformity with other matters where the trial court has discretion, whether the court abused its discretion. See Menendez v. State, 368 So.2d 1278 (Fla. 1979) (ruling on Motion to Sever should not be disturbed absent clear abuse) and Matera v. State, 218 So.2d 180 (Fla. 3d DCA 1969) (ruling on scape of cross-examination not subject to review except in cases of abuse).

Prior to enactment of the sentencing guidelines a trial judge could exercise his discretion in sentencing up to the maximum sentence provided by law for a particular crime without opportunity for appellate review. See Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L.Ed.2d 382 (1980) and Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The courts did consider when exercising this seeming limitless discretion not only pre-sentence reports but also the entire character of the defendant. The Supreme Court said

in United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978);

> Of course, a sentencing judge is not limited to the often far-ranging material compiled in a presentence report. "(B)efore making (the sentencing) determination, a judge may apporpriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446, 30 L.Ed.2d 592, 92 S.Ct. 589 (1972)
>
> (Text 57 L.Ed.2d at 589)

See also Roberts v. United States, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980).

Respondent submits with the exception of the limitation imposed by the guidelines, a trial judge still can consider a defendant's character, etc. in determing what sentence to impose. In order to have an abuse of discretion in sentencing, it must be shown there was no clear and convincing reason for departing from the recommended guideline sentence, i.e. the reason or reasons given for departure is forbidden under the rule and therefore arbitrary. However, as was previously noted Rule 3.701 leaves reasons for departure as broad as an individual case would dictate with the lone exception being the court cannot consider past or present offenses for which there has been no conviction.

The Second District implicitly in this case and expressly in Weems v. State, supra. and Addison v. State, supra., has

recognized its limited role of determining abuse within the language of the rule. The First District in Garcia v. State, 454 So.2d 714, 718 (Fla. 1st DCA 1984) opined:

> In the final analysis, we reject the notion, implicit in this and the mounting 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 courts' 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.
> (emphasis added)

There is no set of absolutes. The absence of a "list" of reasons for departure is consistent with the notion that the court must be free to consider all the mitigating and aggravating circumstances surrounding a crime in order to make an appropriate sentencing decision. Compare, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

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 of 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 that 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). While not specifically articulated, this principal 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. See Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984); Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984), Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984), Webster v. State, 461 So.2d 965 (Fla. 2d DCA 1984), Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984) Higgs v. State, supra.

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 unwarranted 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.

As Judge Nimmons opined in his dissenting opinion in Young v. State, 455 So.2d 551, 553-4 (Fla. 1st DCA 1984):

> Even though some of the articulated reasons may not qualify as clear and convincing reasons under Rule 3.701(d)(11), at least one was. Under such circumstances, I do not understand why this court should be expected to examine all of the other reasons in order to determine whether they, too, would permit departure from the guidelines. Once the appellate court determines that an articulated clear and convincing reason existed for the trial court's imposition of a sentence outside the guidelines, further inquiry into the reasons should not be required. I believe this approach is consistent with the law and comports with logic and reason. Moreover, I believe a contrary approach will be an invitation to resourceful defense counsel to urge the kind of flyspecking review which, I believe, even the framers and proponents of sentencing guidelines never intended. Frequently, conscientious trial judges articulate numerous reason for imposition of a particular sentence, and it is healthy that they do so in order that all interested persons will know why the court did what it did. But if we adopt the appellant's approach to sentence review under the guidelines, we will be compelled to examine each and every reason mentioned by the trial court. And if, for example, only one of five reasons is found to be wanting, the case will have to be remanded for resentencing, with all of the attendant costs associated therewith includ-

> ing the costs of transporting the prisoner to the sentencing court from whatever state corrections institution to which he may have been assigned. Such further erosion of the goal of finality in the criminal judicial process is, in my view, uncalled for.

This approach to the question is consistent with our handling of a similar problem in the context of death cases.

Capital defendants have consistently argued they should have a new sentencing hearing where one or more aggravating circumstance has been erroneously considered by the trial court. And this Court has constantly held the death penalty appropriate where there are good aggravating circumstances found despite the rejection of other aggravating factors. No remand for resentencing is necessary. See Zeigler v. State, 402 So.2d 365 (Fla. 1981); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Shriner v. State, 386 So.2d 525 (Fla. 1980); Antone v. State, 382 So.2d 1205 (1980); Brown v. State, 381 So.2d 890 (Fla. 1980); Ford v. State, 374 So.2d 496 (Fla. 1979), Washington v. State, 362 So.2d 658 (Fla. 1978); Aldridge v. State, 351 So.2d 945 (Fla. 1977) and Elledge v. State, 346 So.2d 998 (Fla. 1977).

Petitioner's reliance on cases from the Minnesota Supreme Court are not persuasive. That court, unlike the appellate courts of this State, has demonstrated a marked penchant of using some vogue arithmetic multiple of the presumptive sentence when departure is warranted. See State v. Evans,

311 N.W. 2d 481 (Minn. 1981); State v. Stumm, 312 N.W. 2d 248 (Minn. 1981); State v. Martinez, 319 N.W. 2d 699 (Minn. 1982); State v. Norton, 328 N.W. 2d 142 (Minn. 1982). Neither the legislature in enacting Section 921.001, Florida Statutes, nor this Court in promulgating Rule 3.701 chose to establish such arbitrary multiples for departing from the recommended sentencing range. Additionally, petitioner's analogy to revocation of probation proceedings was rejected in Albritton v. State, supra.

CONCLUSION

Based upon the arguments advanced above and the authority cited in support thereof, the lower court correctly upheld the departures since it found that the trial court relied upon valid reasons in both cases, notwithstanding the presence of impermissible reasons. This is not to suggest that the determination of the validity of a departure should be reduced to a "numbers game". See State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), where this Court recognized that the capital sentencing procedure is not a mere counting process. The lower court could have properly affirmed even if it found only one reason advanced by the trial judge was permissible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Michael E. Raiden, Assistant Public Defender, Hall of Justice Building, 455 N. Broadway Avenue, Bartow, Florida 33830, this 9th day of April, 1985.

OF COUNSEL FOR RESPONDENT