66,624

IN THE SUPREME COURT OF FLORIDA

JAMES ARTHUR BRINSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 84-1837

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

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DISCRETIONARY REVIEW OF DECISION OF THE
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PRELIMINARY STATEMENT

Petitioner, JAMES ARTHUR BRINSON, was the Appellant in the Court of Appeal and the Defendant in the trial court. Respondent was the Appellee in the District Court and the Plaintiff/ Prosecution in the trial court.

STATEMENT OF THE CASE AND FACTS

In March, 1984, Petitioner JAMES ARTHUR BRINSON was charged by information with nine counts of armed robbery and one count of attempted armed robbery, violations of Sections 777.04 and 812.13, Florida Statutes (1983).(R1-18,80-87) He entered pleas of nolo contendere to these charges before the Honorable Oliver L. Green, Jr., Circuit Judge, Tenth Judicial Circuit (Polk County).(R19-30,88-95)

Petitioner appeared for sentencing July 25, 1984. (R31-39) The presumptive sentence recommended under Florida Rules of Criminal Procedure 3.701 and 3.988 ranged from 5 and 1/2 to 7 years. (R60) The presentence investigation recommended only 4 years prison, followed by 2 years community control, yet the State requested aggravation of the presumptive sentnece. (R33-34) 77) The trial judge imposed a sentence of fifteen years, each count concurrent. (R38,40-51,96-104) He gave the following reasons for aggravation:

> (1) Petitioner provided the firearm used by his co-defendant;
>
> (2) Petitioner received an equal share of the proceeds, an unusually large sum of money;
>
> (3) Petitioner's persistent participation in the offenses indicates he is a dangerous criminal;
>
> (4) Victims were placed in great fear;
>
> (5) Petitioner supplied his drug and alcohol habits from the proceeds of the robbery;
>
> (6) Many people's lives were jeopardized;
>
> (7) Victims may suffer psychological problems as the result of their experiences.

(R60)

Notice of Appeal was filed August 8, 1984. (R52) On February 15, 1985, the District Court of Appeal, Second District, affirmed the judgments and sentences. Brinson v. State, 10 F.L.W. 427 (Fla.2d DCA, February 15, 1985). In so holding, the Court of Appeal stated that five of the trial court's reasons for enhancement of sentence were "valid and proper" while two were "questionable." The Court did not specify which reasons fell into which category. Following the lead of Young v. State, 455 So.2d 551 (Fla.1st DCA 1984), the Court of Appeal certified the following question of great public importance:

> 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?

On February 20, 1985, Petitioner filed notice of his intent to invoke discretionay jurisdiction of the Florida Supreme Court. The Brief of the Merits follows.

ARGUMENT SUMMARY

When a trial judge, in departing from a guideline sentence, cites criteria that are invalid, the case should be remanded for reconsideration. The appellate court should not substitute its judgment for that of the lower court, and attempt the determination whether the sentence should stand notwithstanding the partial error. This position is consistent with the historical aversion of appellate courts to re-weigh decisions of lower courts (an analogy may be drawn to revocations of probation). Further, it is desirable that guideline decisions be subject to strict scrutiny; their appealability is an inherent part of the new guideline sentencing system. Departures from the presumptive sentence should occur only when there exist "clear and convincing" (or to borrow from Minnesota, "substantial and compelling") reasons. The broader carte blanche given trial courts to enhance sentences, the less chance the announced goal of relative sentencing uniformity will be accomplished. In the case at bar, any attempt to second-guess the trial court would be doubly difficult because the Court of Appeal did not indicate which of the several reasons were invalid. (Petitioner also questions whether only two of the seven reasons were invalid.) In sum, it is not possible or even advisable to determine whether the trial judge would have departed to this extent, regardless of his error.

ARGUMENT

ISSUE

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON IMPERMISSIBLE CRITERIA IN DEVIATING FROM THE SENTENCING GUIDELINES, THE CASE SHOULD BE REMANDED FOR RESENTENCING.

When a sentencing court, in deciding to depart from the guidelines, cites some criteria that amount to "clear and convincing reasons," Florida Rule of Criminal Procedure 3.701-(d)(11), and some which do not, what is the proper course for the appellate court reviewing that sentence? It is Petitioner's position that the appellate courts should not undertake a determination whether the valid criteria, standing alone, justify the departure. Rather, the case should be remanded for reconsideration of sentence.

Historically, appellate courts have been averse to substituting their judgment for that of trial courts. The following approach is commonly taken with respect to violations of probation: where an order of violation cites a mixture of valid and invalid findings, the case is usually reversed unless the record is clear the trial court would have revoked solely on the basis of the permissible reasons. See, e.g., Tuff v. State, 338 So.2d 1335 (Fla. 2d DCA 1976); Clemons v. State, 388 So.2d 639 (Fla.2d DCA 1980); Watts v. State, 410 So.2d 600 (Fla.1st DCA 1982).

A similar approach has been taken in some districts with respect to guideline errors. In Young v. State, 455 So.2d 551,552 (Fla.1st DCA 1984), the Court of Appeal found it "impossible to determine whether the trial judge would have come to the same

conclusion" solely on the basis of the departure criteria that the appellate court approved. But see, e.g., Higgs v. State, 455 So.2d 451 (Fla.5th DCA 1984), where the guidelines departure was affirmed where only one of the reasons cited was valid. A middle ground was adopted in Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984), wherein the court would affirm upon a finding that the trial judge's decision to aggravate would not be affected by deletion of impermissible criteria. Suffice it to say there does not exist statewide uniformity, or even District-wide unanimity, as to what to do about guideline errors.

The Fourth District Court of Appeal appears to have assumed the forefront in placing some restraints upon trial judges who wish to depart from the guidelines. In Davis v. State, 458 So.2d 42,45 (Fla.4th DCA 1984), the court concluded that impermissible departure criteria could affect "the extent of the departure" and thus it is "more equitable to reverse and remand for resentencing."

> Cynics may observe that a trial judge upon remand will simply decree the same enhanced punishment for the acceptable reasons. Maybe so and maybe he should. However, he may well not and if the last be possible, simple justice requires that the defendant have his day in court.

Id.

There are sound policy reasons for adopting the position taken in Davis and offering the aggrieved parties another bite at the proverbial apple.

Guideline sentences are simply different from pre-guideline sentences, in that they are specifically appealable even when they do not exceed the statutorily-decreed maximum penalty. §§921.011(5),

924.06(1), and 924.07(9), Fla.Stat. (1983). This appealability is an integral feature of Florida's new and relatively novel sentencing procedure. A per se rule to the effect any one of several reasons justifies departure would effectively hamstring appellate review of guideline decisions.

Among the problems: the Higgs approach encourages a "laundry list" style of sentencing, the enumeration of various and sundry criteria with the hope at least one will "stick." This has already been disapproved in the guideline context. Alford v. State, 9 F.L.W. 2655 (Fla.1st DCA, December 19, 1984). See also Doughtery v. State, 451 N.E.2d 382 (Ind.4th DCA 1983) (disapproving the mere repetition of statutory aggravating factors when passing sentence). The Carney panel almost seems to suggest that trial judges ought to rank their departure criteria in order of importance--then, if a reason low on the pecking order is reversed, the sentence may remain untouched. One likely end result if this formula is endorsed: blanket pronunciamentos by trial courts that all reasons for departure are of equal gravity, and any will suffice to uphold the end result. This is not unlike the judge who, at a revocation of probation, is prescient enough to state, "I find you guilty individually and collectively." While such an approach is probably permissible, it hints at a rather unsatisfying unwillingness to concede one's possible fallibility. All in all, if guidelines departures are rendered relatively facile, the announced goal of sentence uniformity; Florida Rule of Criminal Procedure 3.701(b); Weems v. State, 451 So.2d 1027 (Fla.2d DCA 1984); is undermined. Minnesota, whose sentencing

system is similar to ours, has recognized this potential problem. State v. Norton, 328 N.W.2d 142 (Minn.1982).

The case at bar is additionally troublesome. It is not possible to determine whether the errors cited by the District Court of Appeal are harmless, because the court has not enlightened us as to which two of the seven reasons it agreed were objectionable. Petitioner's "equal participation" in the instant offense does not distinguish him from the majority of criminal defendants. Minnesota, which uses "substantial and compelling" rather than our "clear and convincing" reasons for departure, requires a showing that the particular case is different in some way from the typical. State v. Peterson, 329 N.W.2d 48 (Minn.1983); State v. Cook, 351 N.W.2d 385 (Minn.Ct.App. 1984). The presumptive sentence already has taken into consideration the severity of the offense and the number of counts. Cf. Callaghan v. State, 10 F.L.W. 8 (Fla. 4th DCA, December 19, 1984). The amount of money taken is not "clear and convincing reason" to aggravate a sentence. Mischler v. State, 458 So.2d 37 (Fla.4th DCA 1984). "Persistent participation" is tantamount to equal involvement. All robberies are "dangerous." Cf. Thomas v. State, 10 F.L.W. 63 (Fla.1st DCA, December 20, 1984) (nothing to distinguish the instant offense from any other burglary); State v. Northard, 348 N.W.2d 769 (Minn.Ct.App. 1984)("dangerousness" of defendant not grounds to aggravate). The fact that the victims were "placed in fear" does not justify enhancement because fear is an essential element of robbery. Knowlton v. State, 10 F.L.W. 457 (Fla.4th DCA, February 20, 1985); Cf. Carney v. State, supra (pecuniary gain is inherent in robbery); State v. Hines, 343 N.W.2d

869 (Minn.Ct.App. 1984)(error to enhance on the basis of an element of the offense charged). The jeopardy of the victims is similarly a factor inherent in the nature of armed robbery. The fact that multiple victims were involved is already reflected in the number of counts and, thus, the guideline computation. Problems that victims "may" suffer is irrelevant. While psychological trauma may be cited in departing from the guidelines; Green v. State, 455 So.2d 586 (Fla.2d DCA 1984); there should be some showing such trauma actually exists. Appellate courts have rejected aggravation based on speculative or potential misconduct by the defendant. See, e.g., Lindsey v. State, 453 So.2d 485 (Fla.2d DCA 1984). The same logic should be applied to speculative results of the defendant's conduct.

In sum, Petitioner urges the impossibility of answering the two fundamental questions inherent in this or any guidelines appeal: Had the trial court known it could not rely upon certain objectionable factors, would it still have departed from the presumptive sentence? If so, would it have departed to the extent it did? Given these manifest uncertainties, the most equitable solution is that recommended by the Fourth District in Davis, supra. This provides the trial court a chance to clarify its position, and the defendant a chance to be heard in light of the new developments.

CONCLUSION

For the above reasons and authorities cited, Petitioner respectfully requests this Honorable Court adopt the stance taken in Davis v. State, supra. The decision of the court below should be reversed and this case remanded for resentencing. The first portion of the certified question should be answered in the negative; the second, in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 18th day of March, 1985.

MICHAEL E. RAIDEN