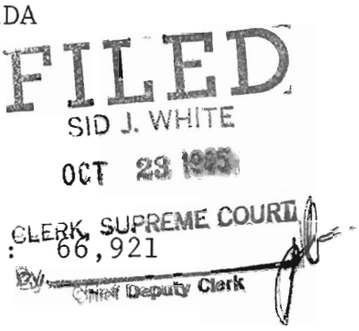
IN THE SUPREME COURT OF FLORIDA



RONNIE DEWEY BROWN,

Petitioner,

v. CASE NO.: 66,921

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Ronnie Dewey Brown, the criminal defendant below, will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below, will be referred to herein as Respondent.

The record on appeal consists of two separately bound and numbered record volumes. Citations to the record concerning the assault charges will be indicated parenthetically as "A" with the appropriate page number(s). Citations to the record concerning the theft charges will be indicated parenthetically as "T" with the appropriate page number(s). Citations to Petitioner's brief on the merits will be indicated parenthetically as "PB" with the appropriate page number(s). Citations to Petitioner's supplemental brief will be indicated parenthetically as "SB" with the appropriate page number(s).

The lower court's decision is reported as Brown v. State, 464 So.2d 193 (Fla. 1st DCA 1985), a copy of which is attached hereto as an appendix.

STATEMENT OF THE CASE AND FACTS

For purposes of resolving the issues raised herein Respondent accepts as accurate, though incomplete, Petitioner's Statement of the Case and Facts (PB 2-5, SB 2) and therefore submits the following additional information:

The record reflects that Petitioner knowingly and voluntarily entered his nolo pleas to grand theft and dealing in stolen property (A 30-36) in return for the following concessions from the State:

> 1. Dismissal of a charge of shooting into an occupied vehicle.
>
> 2. Prosecution of no further charges regarding the facts known in the cases.
>
> 3. Petitioner would not be filed on as an habitual offender.
>
> 4. No opposition to Petitioner's remaining on bond pending sentence.

(A 29,30).

SUMMARY OF ARGUMENT

Petitioner's claim concerning the need for a knowing and intelligent waiver of parole elegibility to appear affirmatively on the record when guidelines sentencing is elected was recently rejected by this Court in Cochran v. State, 10 F.L.W. 492 (Fla. Sept. 5, 1985), thereby mandating affirmance of the lower court on this issue.

Petitioner next challenges the lower court's holding that Florida Statutes § 812.025 was inapplicable to the instant case and its affirmance of his conviction and sentences for both stealing and trafficking in the same stolen property. Respondent argues that the issue was not properly preserved in the trial court, was erroneously reviewed by the lower court and should not be entertained by this Court. Respondent alternatively argues that the lower court's decision on the merits was correct since Florida Statutes § 812.025, on its face, does not apply to cases where, as here, the defendant pleads to both offenses pursuant to a plea bargain agreement and absent the statute there is no reason, including double jeopardy concerns, why a person might not be the thief and also be guilty of dealing in the same stolen property.

Finally, Petitioner seeks relief under this Court's recent decision in Albritton v. State, infra, claiming that some of the trial judge's reasons for departure are invalid and there is no indication that he would have departed in the

absence of such reasons and that the extent of the departure was excessive. Respondent first argues that all of the reasons for departure were valid and thus no Albritton claim as to the initial departure decision will lie. Respondent further argues that even if any or all of the reasons challenged by Petitioner are found invalid, it is clear, beyond a reasonable doubt that the trial judge still would have departed in the absence of such reasons. Lastly, Respondent argues that application of the "reasonableness" test set forth in Albritton to the case at bar demonstrates that the trial judge's sentencing disposition herein was not an abuse of discretion and should be upheld.

ARGUMENT

ISSUE I

PETITIONER'S SENTENCE UNDER THE GUIDELINES SHOULD NOT BE VACATED BECAUSE A KNOWING AND INTELLIGENT WAIVER OF PAROLE ELIGIBILITY NEED NOT AFFIRMATIVELY APPEAR ON THE RECORD. (Restated by Respondent.)

The lower court rejected Petitioner's claim that his sentence under the guidelines should be vacated because a knowing and intelligent waiver of parole eligibility did not affirmatively appear on the record and certified the following question:

> WHETHER A DEFENDANT'S CONSTITUTIONAL RIGHT OF PROTECTION AGAINST EX POST FACTO LAWS IS VIOLATED, WHEN HE AFFIRMATIVELY SELECTS, PURSUANT TO SECTION 921.001(4)(a), FLORIDA STATUTES (1983), TO BE SENTENCED PURSUANT TO THE GUIDELINES BUT THERE IS NO SHOWING IN THE RECORD THAT THE COURT EXPLAINED THAT BY SELECTING GUIDELINES SENTENCING THE DEFENDANT WAIVES HIS ELIGIBILITY FOR PAROLE.

Brown v. State, 464 So.2d 193,194 (Fla. 1st DCA 1985). This Court answered the foregoing question in the negative in Cochran v. State, 10 F.L.W. 492 (Fla. Sept. 5, 1985). Consequently, Petitioner is not entitled to relief on this issue.

ISSUE II

THE ISSUE OF WHETHER APPELLANT WAS CONVICTED OF BOTH THEFT AND TRAFFICKING INVOLVING THE SAME STOLEN PROPERTY IN VIOLATION OF FLORIDA STATUTES § 812.025, WAS NOT PROPERLY SUBJECT TO REVIEW BELOW AND, ALTERNATIVELY, THE JUDGMENT OF CONVICTION ENTERED AGAINST APPELLANT AND THE SENTENCE IMPOSED PURSUANT TO HIS NOLO CONTENDERE PLEA TO GRAND THEFT SHOULD NOT BE VACATED. (Restated by Petitioner.)

Petitioner seeks reversal of his conviction and sentence for grand theft claiming that Florida Statutes § 812.025 prohibits a person from being convicted of both stealing and trafficking in the same property.

Petitioner admitted that this issue was not raised at trial (see Initial Brief of Appellant, p.20) and the record is devoid of any indication that Petitioner, upon entry of his nolo pleas, reserved the right to appeal the issue. Thus, the lower court's review of the issue was procedurally barred, Steinhorst v. State, 412 So.2d 332,338 (Fla. 1982), as well as jurisdictionally barred. Skinner v. State, 399 So.2d 1064 (Fla. 5th DCA 1981); Hall v. State, 397 So.2d 1041 (Fla. 5th DCA 1981); Wells v. State, 390 So.2d 809 (Fla. 5th DCA 1980); Fla.R.App.P. 9.140(b). Since the issue, which is ancillary to the certified question upon which this Court exercised its jurisdiction, was not properly preserved at trial and therefore erroneously entertained by the lower court, this Court should decline review. Cochran v. State,

supra. See also Tillman v. State, 10 F.L.W. 305 (Fla. June 6, 1985); Trushin v. State, 425 So.2d 1126 (Fla. 1983).

In the event this Court should decide to reach the merits of this issue, Respondent would alternatively argue that the lower court correctly decided the issue holding that:

> . . . section 812.025 is inapplicable in situations where, as in the present case, the defendant pleads nolo contendere to both offenses pursuant to a plea bargaining arrangement. By its own terms, the statute is limited to cases involving a jury verdict as to one or both of the offenses. Because there is no double jeopardy prohibition against defendant being convicted and sentenced for both offenses, Lennear v. State, 424 So.2d 151 (Fla. 5th DCA 1982), we affirm on issue 3.

Brown v. State, supra at 195.

The record reflects that Petitioner knowingly and voluntarily entered his nolo pleas to grand theft and dealing in stolen property (A 30-36) in return for certain concessions afforded him by the State, to-wit: dismissal of a charge of shooting into an occupied vehicle; prosecution of no further charges regarding the facts known in these cases; Petitioner would not be filed on as an habitual offender; and no opposition to Petitioner's remaining on bond pending sentence (A 29, 30).

Florida Statutes § 812.025 provides:

> Notwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge

> theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or the other, but not both, of the counts. [Emphasis added.]

While the statute precludes the trier of fact from returning a guilty verdict on both counts, it does not preclude an adjudication of guilt and imposition of sentence predicated upon a knowing and voluntary nolo contendere plea to both counts pursuant to a plea bargain agreement. Since in the absence of Florida Statutes § 812.025, there is no reason, including double jeopardy concerns, why a person might not be the thief and also be guilty of dealing in the same stolen property, Coley v. State, 391 So.2d 725,727 (Fla. 1st DCA 1981), Lennear v. State, 424 So.2d 151,152 (Fla. 5th DCA 1982), and since the statute does not preclude an adjudication of guilt and imposition of sentence on both counts predicated upon nolo contendere pleas, Petitioner's conviction for grand theft and resulting sentence should not be vacated.[1,2]

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[1]Petitioner's reliance on Cleaves v. State, 450 So.2d 511 (Fla. 2d DCA 1984), is misplaced since the district court, in reviewing an order revoking the appellant's probation refused to address the issue raised herein holding that:

> Any inference derived from the fact that the same property was involved on dates in close proximity with each other is

Accordingly, Petitioner's conviction and sentence for grand theft should be affirmed because the issue was not preserved at trial and improperly entertained below, or, alternatively, because, as the lower court correctly concluded, Florida Statutes § 812.025 was inapplicable to the instant case and in the absence thereof there exists no prohibition against Petitioner being convicted and sentenced for both offenses.

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1 (Continued from page 7).

> not enough to make void the previous adjudications of guilt based on the prior nolo contendere pleas. An appeal from an order revoking probation may only review proceedings subsequent to the order or probation.

Id. at 512.

[2]Assuming arguendo that Florida Statutes § 812.025 is applicable to the instant case, Respondent contends that Petitioner, by virtue of his knowing and voluntary nolo contendere pleas, waived any benefits afforded him under the statutes as a condition of his plea bargain agreement. If it is impermissible for a trial judge, who accepted a bargained guilty plea agreement thereby binding the defendant and the prosecution, to rescind his acceptance of the agreement, United States v. Cruz, 709 F.2d 111 (1st Cir. 1983), and if it is impermissible for the prosecution to renege on a promise inducing a guilty plea, Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), then it is likewise impermissible for a defendant to attempt to relieve himself of a detriment he incurred as a condition of a plea agreement. Having enjoyed the benefits of a plea bargain, Petitioner cannot now be permitted to avoid a detriment he knowingly and voluntarily incurred.

ISSUE III

THE TRIAL JUDGE'S IMPOSITION OF A SENTENCE IN EXCESS OF THE GUIDELINES RECOMMENDED RANGE WAS NOT ERROR IN TERMS OF EITHER THE PROPRIETY OF THE DEPARTURE OR THE EXTENT THEREOF. (Restated by Respondent.)

Petitioner seeks remand of this cause for resentencing pursuant to Albritton v. State, 10 F.L.W. 426 (Fla. Aug. 29, 1985), claiming that some of the trial judge's reasons for departure were improper and there was no clear indication that he would have departed in the absence of said reasons and that the extent of the departure was excessive.

Initially, Respondent contends that all of the reasons relied upon by the trial judge were valid and Petitioner is therefore without grounds to raise an Albritton claim. The trial judge predicated his departure upon the following reasons:

> The sentencing guidelines recommend a sentence of 4½ to 5½ years (202 points). The Court finds that this recommended sentence is inadequate punishment for the Defendant's prior behavior. The Court further finds clear, convincing and compelling reasons for deviating from said guidelines. The Defendant's record indicates prior convictions on eight three degree felonies and three misdemeanors, some of which involve violent behavior. In the present case the Defendant, without provocation, shot into a car toward four innocent people, one of whom was a female nine months pregnant. He fired into the car repeatedly until he wounded one of the occupants. He committed this

> act approximately two months after committing a burglary involving over $20,000.00 worth of firearms, some of which were hand guns. The Defendant displays no remorse for his behavior. Since 1977, he has been on probation, been in prison and been on parole. His behavior has not improved. The Defendant's prior actions indicated that he is a dangerous person with no respect for the law, and a menace to society. . . .

(A 19).

Petitioner first takes exception to the trial judge's reliance upon his prior record as a reason for departure (SB 4), evidently because his prior record had already been factored into the scoring. See Hendrix v. State, 10 F.L.W. 425 (Fla. Aug. 29, 1985). Hendrix is inapposite to the instant case since the scoresheet utilized by the trial judge (A 18), made no provision for assigning points to four of Petitioner's eight prior felony convictions. Consequently, the trial judge properly could have relied upon Petitioner's prior record to the extent that it wasn't accounted for in the scoresheet. Weems v. State, 469 So.2d 128 (Fla. 1985); Russell v. State, 458 So.2d 422 (Fla. 2d DCA 1984). See also Young v. State, 455 So.2d 551,553 (Fla. 1st DCA 1984), Nimmons J., dissenting.

Petitioner next takes exception to the trial judge's reason for departure concerning his having fired into a car toward four innocent people, one of whom was nine months pregnant (SB 4,5). He claims that this reason is invalid

under Fla.R.Crim.P. 3.701(d)(11), since it was based upon circumstances of an offense or arrest for which no convictions had been obtained. The record reflects that Petitioner was charged with, pled to, and was adjudicated guilty of aggravated battery with a firearm of David Gurley (A 1,12,13). Respondent maintains that the facts that other people were in the car with Gurley, and that one of them was pregnant, were matters related to the nature and circumstances of the offense for which Petitioner was convicted, were therefore not precluded from consideration by Fla.R.Crim.P. 3.701(d)(11), and were properly relied upon by the trial judge as a reason for departure. Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984). See also Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984).

The last reason challenged by Petitioner was his lack of remorse. He claims that the trial judge erred in relying upon said reason as a basis for departure and that the lower court's failure to so hold was inconsistent with its decision in Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985) (SB 5). In Hunt, the lower court cited Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984) and Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984) as supporting authority for its disposition of the lack of remorse issue. Both of those cases stand for the proposition it is error to depart from the guidelines for failure to show remorse in the face of unflagging protestations of innocence. Mischler v. State, supra at 38; Hubler v. State, supra at 353. Inasmuch as the instant record contains no such

protestations of innocence, unflagging or otherwise, on Petitioner's part, the lower court's silence concerning the trial judge's reliance upon lack of remorse herein is not at all at odds with Hunt or Hubler and Mischler.

Moreover, in cases such as this, where the defendant has not attempted to assert innocence, a showing of remorse or contrition on his part could serve as a positive indication of his prospects for rehabilitation--still a valid sentencing concern under the guidelines. See Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984); Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984); Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984); Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984); Jean v. State, 455 So.2d 1083 (Fla. 2d DCA 1984); Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984). Concomitantly, a lack of remorse under such circumstances, as was the case here, should properly be considered by the sentencing judge as a relevant factor demonstrating unamenability to rehabilitation.

Petitioner does not challenge the validity of the remainder of the trial judge's reasons for departure which are briefly summarized as follows:

> 1. Commission of the aggravated battery within two months of the commission of a burglary involving $20,000.00 worth of firearms, some of which were hand guns.
>
> 2. Petitioner's unamenability to rehabilitation.

3. The danger Petitioner poses to society.

(A 19). As a result, Respondent contends that all of the reasons relied upon by the trial judge were valid and his decision to depart was therefore not error.

However, for the purpose of addressing Petitioner's claim under Albritton v. State, supra,[3] Respondent argues that even if one or more of the reasons for departure challenged by Petitioner are found to be invalid, it is clear, beyond a reasonable doubt, that the trial judge still would have departed in the absence of any such invalid reason or reasons. See Brooks v. State, 10 F.L.W. 479 (Fla. Aug. 29, 1985), indicating that Albritton was not intended to have set forth a per se rule of reversal whenever a reason is found invalid.

The best evidence that the trial judge would have departed, and to the same extent, notwithstanding the invalidity of one or all of the challenged reasons is found in the underlying theme permeating the entirety of his statement of reasons for departure, to-wit: Petitioner's unamenability to rehabilitation and the resultant real and constant danger he poses to society due either to his inability or lack of desire to conform his conduct to the dictates of the law. Put simply, removal of any or all of the challenged reasons from

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[3]The lower court did not have the benefit of this Court's decision in Albritton when it disposed of the instant case.

the calculus which lead to the departure decision herein would not change the bottom line which is in essence a reasonable judicial determination that the guidelines recommended range herein was woefully inadequate to afford society protection from a career criminal. Consequently, remand of this cause for resentencing is unnecessary.

With respect to Petitioner's argument that the extent of the trial judge's departure was excessive, this Court, in Albritton, stated that "the proper standard of review is whether the judge abused his judicial discretion." Albritton v. State, supra at 10 F.L.W. 426. This Court added that the reviewing court "should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if the departure is reasonable." Id. at 10 F.L.W. 426. Basically, this Court mandated the employment of the following test for review of judge's discretionary power set forth in Canakaris v. Canakaris, 382 So.2d 1197,1203 (Fla. 1980):

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision

> fails to satisfy this test of reasonableness.

See also Albritton, supra at 10 F.L.W. 427, n.3.

The crux of Petitioner's argument on this point appears to be that the trial judge's imposition of sentences amounting to forty (40) years where the recommended range was 4½ - 5½ years was an abuse of discretion because some of the reasons he relied upon for departure were invalid (SB 6). While steadfastly maintaining that all of the trial judge's reasons were valid, Respondent submits, as argued above, that even if any or all of the reasons challenged by Petitioner are found invalid, the departure and the extent thereof should be upheld. Application of the "reasonableness" test to the record before this Court unequivocally demonstrates that the trial judge's sentencing action was not an abuse of discretion. The simple fact of the matter is that the record establishes that past efforts to rehabilitate Petitioner failed miserably and he therefore poses a constant threat to society. Consequently, Respondent submits that reasonable judges would recognize the inadequacy of the recommended range to afford society any meaningful protection from Petitioner and could impose disparate departing sentences including the one imposed here. Accordingly, the trial judge's sentencing disposition was not an abuse of discretion and should be upheld. Albritton v. State, supra; Lerma v. State, 10 F.L.W. 2273 (Fla. 5th DCA 1985).

CONCLUSION

Based upon the foregoing arguments and the authority cited herein, the decision of the First District Court of Appeal in this cause should be affirmed.

Respectfully submitted:

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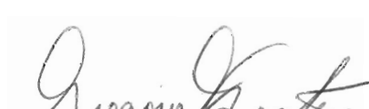
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Respondent's Brief on the Merits was forwarded to Larry G. Bryant, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 23rd day of October, 1985.



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