

IN THE FLORIDA SUPREME COURT

RONNIE DEWEY BROWN,

Petitioner,

v.

CASE NO. 66,921

STATE OF FLORIDA,

Respondent.

FILED ✓

SID J. WHITE

OCT 3 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

SUPPLEMENTAL BRIEF OF PETITIONER

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LARRY G. BRYANT
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I PRELIMINARY STATEMENT	1
II STATEMENT OF THE CASE AND FACTS	2
III SUMMARY OF ARGUMENT	3
IV ARGUMENT	
<u>ISSUE PRESENTED</u>	
THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES SENTENCE BECAUSE (1) THE REASONS FOR DEPARTURE WERE NOT CLEAR AND CONVINCING AND (2) THE EXTENT OF DEPAR- TURE WAS EXCESSIVE.	
	4
V CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Albritton v. State</u> , 10 FLW 426 (Fla. August 29, 1985)	5,6
<u>Brown v. State</u> , 464 So.2d 193 (Fla. 1st DCA 1985)	1,2
<u>Fletcher v. State</u> , 457 So.2d 570 (Fla. 5th DCA 1984)	5
<u>Hendrix v. State</u> , 10 FLW 425 (Fla. August 29, 1985)	4
<u>Hunt v. State</u> , 468 So.2d 1100 (Fla. 1st DCA 1985)	5
 <u>MISCELLANEOUS</u>	 <u>PAGE(S)</u>
Rule 3.701(d)(11)	4,7

IN THE FLORIDA SUPREME COURT

RONNIE DEWEY BROWN,	:	
	:	
Petitioner,	:	
	:	
v.	:	CASE NO. 66,921
	:	
STATE OF FLORIDA,	:	
	:	
Respondent.	:	
_____	:	

SUPPLEMENTAL BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

This supplemental brief is submitted pursuant to this Court's order granting petitioner leave to file a supplemental brief on issues presented in the district court but not addressed by the opinion of that court in Brown v. State, 464 So.2d 193 (Fla. 1st DCA 1985).

This appeal is a consolidation of two criminal cases originating in the Circuit Court of Okaloosa County. Two separately bound and numbered records have been prepared. References to the pages in the separate records will be preceded by the symbol "A" for the case pertaining to the assault and "T" for the case pertaining to the theft.

II STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the statement of the case and facts as set forth in his initial brief with the following additions.

Issue II in Petitioner's initial brief in the district court sought review of the reasons for departure and the extent of departure. The district court addressed Issue II as follows:

Defendant's second point is that the court failed to set forth sufficient clear and convincing reasons for departing from the guidelines sentence and that the court's departure from the guidelines sentence was excessive. With respect to the latter argument, it has been held that there is no basis in the sentencing guidelines rules or statutes for setting aside a sentence as excessive so long as it is within the statutory maximum. Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984); Dorman v. State, 457 So.2d 503 (Fla. 1st DCA 1984). We affirm the trial court's departure from the guidelines since the court set forth clear and convincing reasons for such departure.

Brown v. State, 464 So.2d 193 (Fla. 1st DCA 1985).

III SUMMARY OF ARGUMENT

Petitioner contends the trial court relied upon improper reasons in departing from the recommended guidelines. Petitioner also contends the trial court erred in imposing a sentence eight times that of the recommended guidelines sentence.

IV ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES SENTENCE BECAUSE (1) THE REASONS FOR DEPARTURE WERE NOT CLEAR AND CONVINCING AND (2) THE EXTENT OF DEPARTURE WAS EXCESSIVE.

Several reasons for departure were given for the departure from the recommended sentence of five years (T 16).

The first reason given for departure was petitioner's prior record (T 16). This Court has recently held that a defendant's prior criminal record is not a proper reason for departure. Hendrix v. State, 10 FLW 425 (Fla. August 29, 1985). The district court did not address why the reasons given for departure were "clear and convincing." Clearly, the reason relating to petitioner's prior record is improper and requires this cause be remanded for resentencing.

The second reason given for departure was that appellant fired into a car toward four innocent people, one of whom was nine months pregnant (T 16). Rule 3.701(d)(11) precludes use of aggravating circumstances based on "factors" of the offense or arrests for which there have been no convictions. The committee note further explains the rule prohibits the Court "from considering offenses for which the offender has not been convicted."

Petitioner had been charged with, but not convicted of, shooting into an occupied vehicle. Plainly, therefore, it was error for the judge to base aggravation on "factors" relating to shooting into the vehicle or to "consider" that alleged of-

fense when departing from the guidelines. The Fifth District Court has held that reasons for departure relating to crimes for which a defendant has been acquitted are improper. See Fletcher v. State, 457 So.2d 570 (Fla. 5th DCA 1984). Petitioner contends the instant case is indistinguishable from Fletcher, supra. Here, petitioner agreed to plead nolo to a number of charges in exchange for the state dismissing the charge of shooting into an occupied vehicle (A 29-30). The district court failed to address specifically whether the above reason was "clear and convincing" but instead held the reasons for departure to be "clear and convincing." This Court must reject the above reason for departure and remand this cause for resentencing.

The trial court also found petitioner's lack of remorse to be a reason for departure. The district court did not say whether lack of remorse was a proper reason for departure but held the trial court had stated "clear and convincing" reasons for departure. The failure of the district court to hold lack of remorse to be an improper reason for departure is inconsistent with its holding in Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985).

Clearly, the three reasons for departure discussed above are improper. There was no clear indication by the trial judge that he could have departed if some of the reasons for departure were found to be improper (T 16). In light of this Court's recent opinion in Albritton v. State, 10 FLW 426 (Fla. August 29, 1985), this cause must be remanded to the trial court for resentencing without consideration of the improper reasons for departure.

Petitioner also argued that the extent of departure was excessive. The district court held that "there is no basis in the sentencing guidelines rules or statutes for setting aside a sentence as excessive so long as it is within the statutory maximum." The district court should have applied an abuse of discretion standard. See Albritton, supra. In Albritton this Court held the appellate court should look at such things as the guidelines sentence, the extent of departure, the reasons given for departure and the record to determine if the departure was reasonable.


Had the district court reviewed the sentence as outlined in Albritton it would have found the guidelines sentence was 4 1/2 - 5 1/2 years (A 44), the total sentence imposed to be 40 years (T 14-15) and at least three of the reasons given for departure to be improper. Here, the trial court clearly abused its discretion in imposing a sentence eight times the length of the recommended sentence and by relying on improper reasons for departure.

V CONCLUSION

For the reasons and authorities set forth above petitioner respectfully requests this Honorable Court to remand this cause for resentencing pursuant to Rule 3.701, Florida Rules of Criminal Procedure.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT


LARRY G. BRYANT
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Supplemental Brief of Petitioner has been furnished by hand to Assistant Attorney General Gregory G. Costas, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to Petitioner, RONNIE DEWEY BROWN, #909250, Post Office Box 1500, Mail Box No. 8, Cross City, Florida 32628 on this 3rd day of October, 1985.


LARRY G. BRYANT