

IN THE SUPREME COURT OF FLORIDA

DONALD WADE,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

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CASE NO. 66-95
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PETITIONER'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

DONALD WADE, :
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v. : CASE NO. 66,957
STATE OF FLORIDA, :
Respondent. :
_____ :

PETITIONER'S REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent's brief will be referred to as "RB." Other references will be designated as set forth initially.

II ARGUMENT

ISSUE I

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?

As acknowledged by respondent, the certified question has now been answered in petitioner's favor in Albritton v. State, 10 F.L.W. 426 (Fla. August 29, 1985). As argued in Issue II, petitioner maintains that his sentence must be reversed because the state has not shown beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence.

ISSUE II

THE DEPARTURE FROM THE RECOMMENDED SENTENCE
MUST BE REVERSED BECAUSE THE REASONS GIVEN
WERE NEITHER CLEAR AND CONVINCING AND THE
AMOUNT OF DEPARTURE WAS EXCESSIVE.

As petitioner argued initially, almost all of the trial judge's stated reasons for departure¹ refer either to inherent elements of the crimes for which he was convicted or to petitioner's criminal record. All of these factors were already factored in the scoresheet in order to arrive at a presumptive sentence. All of these reasons are therefore improper bases for departure under the rationale of Hendrix v. State, 10 F.L.W. 425 (Fla. August 29, 1985), where this Court stated:

To allow the trial judge to depart from the guidelines based upon a factor which has already been weighed in arriving at a presumptive sentence would in effect be counting the convictions twice which is contrary to the spirit and intent of the guidelines. Accord, State v. Brusven, 327 N.W.2d 591 (Minn. 1982); State v. Erickson, 313 N.W.2d 16 (Minn. 1981); State v. Barnes, 313 N.W.2d 1 (Minn. 1981). We agree with the First District Court of Appeal in that '[w]e find a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the same factor is included in the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity.' Burch v. State, 462 So.2d 548, 549 (Fla. 1st DCA 1985).

¹ The state has attempted to "rewrite" the reasons to ones which have received appellate imprimatur (RB 3, 12-13). Of course, it is the trial judge's duty - not an assistant attorney general's - to articulate the clear and convincing reasons for departure.

The remaining reasons for departure - that petitioner is mentally ill and showed no remorse - are invalid as well. (See initial brief pp. 33-36). In short, the only arguably valid reason among the plethora of ones assigned by the trial judge to support the departure is that relating to the emotional trauma caused the victim. Cf. Weems v. State, 469 So.2d 128 (Fla. 1985) (although ancient juvenile convictions cannot be scored, could be a basis for departure). Rhetoric aside, the state has wholly failed to establish that the impermissible reasons herein (of which there are at least seven) did not affect the decision to depart itself or the extent of the departure (which equals more than six times the recommended guideline sentence). Since the state has not shown beyond a reasonable doubt that the invalid reasons did not affect the sentence imposed, petitioner's sentences must be reversed and the cause remanded for imposition of the guidelines sentences.

III CONCLUSION

Since the trial court failed to articulate clear and convincing reasons justifying departure from the recommended guideline sentence, petitioner's sentences must be reversed and the cause remanded for entry of the guideline sentence.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

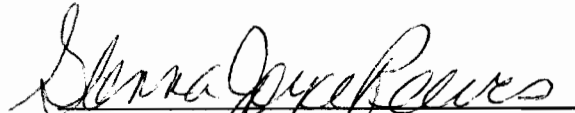


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Wallace E. Allbritton, The Capitol, Tallahassee, Florida, 32302, this 17th day of September, 1985.



GLENNA JOYCE REEVES
Assistant Public Defender