IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,963

TERENCE A. BAKER,

Respondent,

-v-

THE STATE OF FLORIDA,

Petitioner.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT AND CROSS PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

TERENCE A. BAKER was the Defendant in the Trial Court and the Appellant in the Third District Court of Appeal in Baker v. State, __So.2d__ 10 F.L.W. 852 (Fla. App. 3rd DCA April 5, 1985).

In this Court, Baker is the Respondent and Cross Petitioner. The Petitioner herein was the prosecution in the Trial Court the Appellee below.

References to the Record on Appeal will be indicated by the symbol "R". The Supplemental Record on Appeal will be referred to by the symbol "S". The references to the Appendix filed by Respondent-Cross Petitioner will be indicated by the symbol "A".

All emphasis has been supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The Respondent-Cross-Petitioner accepts the statement of the case and facts with the following exceptions. There were no plea negotiations entered into by the Petitioner and Respondent with regard to any sentence to be imposed upon the Respondent-Cross-Petitioner. The record reflects that the plea discussions were between the Trial Court and the Respondent-Cross-Petitioner with the Petitioner present (T 21, hearing of April 24, 1984).

In addition, Respondent also filed a Notice to Invoke Discretionary Jurisdiction which was treated by the Court as a cross petition to invoke discretionary jurisdiction. (A 6). The facts of the case as found by the Appellate Court are:

> "The day began when Baker dropped the paint cans and ran because some store employees interrupted his unlawful asportation of ten gallons of paint. When Baker was caught by a uniformed police officer acting in the line of duty, he wrestled the officer to the ground, picked up the officer's gun, shot the officer, and fled with the officer's gun. The day ended with Baker, a man with no prior criminal record, being charged with a life felony (attempted first degree murder) and six thrid-degree felonies, namely, burglary of the paint store, theft of the paint, resisting arrest with violence, battery on a law enforcement officer, unlawful possession of a firearm while engaged in a criminal offense, and theft of the officer's gun."

QUESTIONS PRESENTED

I

The Respondent submits the following question as being determinative of the cause.

WHETHER THE APPELLATE COURT CAN PRONOUNCE AS A VALID REASON FOR DEPARTING FROM THE SENTENCING GUIDELINES PROMULGATED BY THIS COURT THAT A DEFENDANT WHO CHOOSES TO MAKE A POLICE OFFICER ACTING IN THE LINE OF DUTY A VICTIM OF HIS CRIME CAN BE TREATED DIFFERENTLY THAN A DEFENDANT WHO COMMITS THE SAME CRIME UPON AN ORDINARY PERSON?

II

CERTIFIED 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?

SUMMARY

I

The approval by the Appellate Court of a reason contrary to the purposes and principles of Rule 3.701(b) is an usurpation of this Court's power to provide rules of procedure for all the Court. As such, the reason approved by the Appellate Court cannot stand as the sole clear and convincing a reason to depart from a prescribed sentence.

II

The Appellate Court when considering a departure from the guidelines must before approving a reason for such departure must determine whether the reason declared comports with the purposes and principles of the rules.

ARGUMENT

I

THE APPELLATE COURT CANNOT PRONOUNCE AS A VALID REASON FOR DEPARTING FROM THE SENTENCING GUIDELINES PROMULGATED BY THIS COURT THAT A DEFENDANT WHO CHOOSES TO MAKE A POLICE OFFICER ACTING IN THE LINE OF DUTY A VICTIM OF HIS CRIME CAN BE TREATED DIFFERENTLY THAN A DEFENDANT WHO COMMITS THE SAME CRIME UPON AN ORDINARY PERSON.

It is clear that the question certified by the Third District Court is predicated upon the fact that one valid permissible, clear and convincing reason exists upon which a departure from the guidelines can be justified.

All parties agree that four of the five reasons given by the trial court were improper. The Third District stated:

> "Baker pleaded guilty to all the charges. The recommended sentence under the sentencing guidelines was twelve to seventeen years in prison. When the trial court imposed a sentence of thirty-four years, Baker appealed.
>
> Baker contends that the reasons given by the trial court for departing from the sentence recommended under the guidelines do not justify the departure. The trial court's stated reasons for departure were five in mumber:
>
> 1. The act was done in a willful, aggressive and premeditated manner.
>
> 2. The act was done during the commission of a theft and burglary.
>
> 3. The act was committed for pecuniary gain.

4. The victim did not provoke the defendant's actions.

5. The victim was a uniformed police officer.

It is well established that an inherent component of the crime, being already built into the guideline range, will not justify a guideline departure. See Bowdoin v. State, ___So.2d___ (Fla. 4th DCA 1985) (Case No. 83-2764, opinion filed February 20, 1985) (use of a gun inherent component of robbery with a deadly weapon); Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984) (premeditation, calculation, objective of pecuniary gain, and lack of provocation inherent components of armed robbery). Thus, that the act of attempted first degree murder was unprovoked and done in a "willful, aggressive, and premeditated manner," common ingredients of all attempted first degree murders, are not proper reasons for departure.

Likewise, that the act (referring to the act of attempted first degree murder, that is, the primary offense) was committed "for pecuniary gain" and "done during the commission of a theft or burglary" are not justifiable reasons for departing from guidelines. The burglary and theft were, as we have noted, additional offenses at conviction for which points were already assessed against the defendant. Were these, or any, underlying or additional offenses again used to support guideline departure, then departure would be justified in any instance where multiple offenses are charged. Otherwise stated, the fact that the additional offenses were committed along with the primary offense is, as the guidelines already state, a reason to increase the score on the defendant's guideline scoresheet, but not a reason to aggravate the defendant's sentence outside of the guidelines (A1-3)".

Clearly, then, it was not the act itself or the manner that the act was committed, or the Respondent Cross Petitioner's past record which was sufficiently reprehensible to enhance his punishment. According to the Third District, it was the status of the victim alone which supports the departure from the guidelines. Rule 3.701(b) Fla. Sta. statement of purpose provides:

> "(b) Statement of Purpose"
>
> The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the State. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivety in interpreting specific offense and offender-related criteria and in defining their relative importance in the sentencing decision."

No mention is made in §3.701(b) F.R.Cr.P. with regard to the status of the victim or victims and their relative importance in the sentencing decision. While attempted first degree murder is a serious crime, the principles enunciated in §3.701.(b) 3, 4 further demonstrate that the severity of the crime and the circumstances surrounding the offense, as well as the offender's criminal history are the basis for the ultimate sentence. Therefore,

as the Third District in its opinion stated the acts of the Respondent-Cross-Petitioner in the instant cause were an "inherent component of the crime, being already built into the guideline range . . . . common ingredients of all attempted first degree murders," and not proper reasons for departure. The additional offenses committed by the Respondent-Cross-Petitioner are reasons for the trial court to increase the sentence within the range of the guidelines, but not to aggravate them outside the guidelines.

The peril of the District Court's assertion that:

> "[W]e see no reason why a court may not validly pronounce as a reason for departing from the sentencing guidelines that a defendant who chooses to make a police officer acting in the line of duty the victim of his crime is to be treated differently than a defendant who commits the same crime upon an ordinary citizen."

is two fold.

1. Such a reason is not provided for in the purpose and principles of the rule, and modifies the rule as it presently exists. The Supreme Court is solely vested with the authority to promulgate, rescind and modify procedural rules, and until the rules are changed by this Court, the source of the authority, they remain inviolate. State v. Lott, 186 So.2d 565 (Fla. 1973). Neither the trial court or the appellate court has the power to amend the

rules. State v. Bryant, 276 So.2d 184 (Fla. App. 1st DCA 1973). Article V, Section 2(a) of the Florida Constituion provides:

> "The Supreme Court shall adopt rules for the practice and procedure in all courts . . . . These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of legislature."

Although the Appellate court in this cause recognized the power of this Court and legislature to enact rules and legislation creating special situations for law enforcement officers, it admits there is no case law directly holding that this reason alone can justify an excessive sentence. However, it did not wait for this Court to so promulgate or amend the rule which would permit the sentencing court to consider the status of the victim, per se, as a cogent reason for departure. The appellate court directly held that the special status of a police officer can justify an excessive sentence. Under the guidelines, the Florida Constitution and the case law with regard to the sentencing guidelines, this reason is impermissible and an usurpation of this Court's supreme authority.

2. While such a guideline may be viable, there is no authority provided by the Supreme Court to do so. Other special cases would soon appear. An elderly lady may be a

victim of a crime and as such an appellate court could find that alone as reason for an enhanced sentence outside the guidelines. How about a judge or legislator in the performance of its duty becoming a victim of a crime? This is exactly what the guidelines were supposed to avoid by promulgating a uniform set of standards to guide the sentencing judge and not a subjective patch work quilt based upon each sentencing judge's personal feelings.

The Respondent-Cross-Petitioner agrees with Petitioner's statement in which it states that the trial court may rely upon any factor concerning the nature and circumstances of the offense as well as the Defendant's background. Certainly, the Third District Court considered both the act and the Defendant's background and rejected same as clear and convincing reasons for sentencing outside the guidelines. In Mischler v. State, 458 So.2d 37 (Fla. App. 4th DCA 1984), the trial court sought departure from the guidelines because "white collar crimes" per se deserve harsher penalties. Lack of remorse was also given as a clear and convincing reason. The Fourth District clearly agrees with Respondent-Cross-Petitioner's argument in reversing the subjective action by the trial court. The Fourth District compiled all the cases interpreting the departure from the guideline limitations. None of them are based upon the fact that the victim was a uniformed police officer or the status of the victim.

The Petitioner argues that the judicial discretion is abused where the judicial action is arbitrary, fanciful or unreasonable and that if reasonable, men differ as to the propriety of the action, then the trial court cannot be said to have abused its discretion. Hair v. Hair, 402 So.2d 1201 (Fla. App. 5th DCA 1981), pet. for rev. denied 412 So.2d 412 So.2d 465 (Fla. 1982). Hair, supra, an equity case of dissolution of marriage did not interpret rules of procedure but sought to do equity between the parties. In the case at bar, the trial court and the appellate court sought to change, or amend the rules or promulgate new rules with regard to what constitutes clear and convincing reasons.

In Addison v. State, 452 So.2d 955 (Fla. App. 2d DCA 1984), the Second District was involved with a violation of a substantive condition of probation which was admitted and not the special status of the victim. Clearly, the facts are different.

The 1st District decision in Garcia v. State, 454 So.2d 714 (Fla. App. 1st DCA 1984) is very interesting in that the defendant was sentenced outside the guidelines because the specific circumstances of the offense and the factor attending the offense were reprehensible. Departure was approved. See Manning v. State, 452 So.2d 136 (Fla. App. 1st DCA 1984).

The above cases demonstrate a proper use of discretion, however in the case at bar, the trial court and the appellate court abused its discretion by setting on the status of the victim as a special person without the authority of this Court or the legislature or by any case law in Florida for departing from the guidelines. See Higgs v. State, 455 So.2d 457 (Fla. App. 5th DCA 1984). All the authority cited by the Petitioner refers to the offense or the offender. If the offense or the offender and the circumstances surrounding these two elements are sufficiently compelling, then the Court can depart. However, if they are not compelling and are essentially facts and circumstances which are inherently and usually components of the crime committed as in the case at bar, then departure from the guidelines is an abuse of discretion.

II

CERTIFIED 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 SHOULD EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY A DEPARTURE FROM THE GUIDELINES AND THE CASE BE REMANDED FOR A RESENTENCING.

Respondent now turns to the Certified Question of great public interest. It is Respondent's position that all the reasons given by the trial court in this cause were invalid. When the appellate court approved of the reason that the victim was a uniformed police officer as clear and convincing reason to support a departure from the guidelines, it caused an abuse of discretion for reasons stated below.

However, assuming arguendo, as the certified question asks, if one or more clear and convincing reason is impermissible as a matter of fact and law, should an appellate court examine other reasons by the sentencing court to determine if those reasons justify a departure from the guidelines.

In Young v. State, 455 So.2d 551 (Fla. App. 1st DCA 1984), the majority held that most of the reasons for

departure from the prescribed sentence are impermissible and unconvincing, and the possible clear and convincing reason when examined in light of a confusing record makes it impossible to determine whether the sentencing judge would have come to the same conclusion because of the one valid reason alone, the case should be remanded for re-sentencing in accordance with Rule 3.701 F.R.Cr.P. A strong dissent urged that one clear and convincing reason is sufficient to affirm. The exact question certified to this Court in the case at bar was certified to this Court by the First District. In Mitchell v. State, 458 So.2d 10 (Fla. App. 1st DCA 1984), the sentencing court departed from the guidelines because the bale of marijuana possessed by the defendant was just a part of a large scale of marijuana transaction. The majority held that this reason was sufficient. A dissent urged that the cause be remanded for sentencing within the guidelines because the sentencing court based its reason on the instant offense for which the defendant had not been convicted. The defendant had been acquitted of conspiracy. The dissent also argued that the majority re-wrote the rules.

In Carney v. State, 458 So.2d 13 (Fla. App. 1st DCA 1984), the First District also certified the same question to this Court as in Young, supra. However, the majority agreed with the dissenting opinion in Young, and receded from a per se rule which requires remand if permissible and

impermissible reasons are given.

The majority urges this court to consider that the reviewing court shall affirm the sentencing court's departure where impermissible and permissible reasons are given, where the reviewing court finds that the sentencing court decision to depart from the guidelines, or the severity of the sentence imposed outside the guidelines would not have been affected by the elimination of the impermissible reasons or factors stated.

The Fifth District's position is that any valid, clear and convincing reason is sufficient to affirm. Albritton v. State, 458 So.2d 320 (Fla. App. 5th DCA 1984). The Fifth District based its decision on Rule 3.800(b) F.R.Cr.P. which empowers the sentencing court to reduce or modify a sentence within sixty (60) days of a mandate.

The Second District in Webster v. State, 461 So.2d 965 (Fla. App. 2nd DCA 1984) follows the decision in Albritton, supra. Willard v. State, 462 So.2d 102 (Fla. App. 2d DCA 1985).

Recently in Burch v. State, 462 So.2d 458 (Fla. App. 1st DCA 1985), the First District certified a question to this Court which is consistent with the dicta in Carney, supra by applying the harmless error rule to the impermissible reasons.

It is clear that the trend among the district

courts is that if there is one valid permissible clear and convincing reason among various impermissible reasons, the reviewing court should affirm. However, it is submitted that the one valid reason should strictly be tested under the written statement of purpose and principle embodied within Rule 3.701 F.R.Cr.P. In the case at bar, this means that the sentencing court must consider the offense and offender related criteria and not the status of the victim.

It is clear that the trial court in the case at bar subjectively used as a reason, that the victim was a uniformed police officer. The appellate court reversed and remanded for re-sentencing declaring that the alleged one valid reason, to-wit: that the victim was a uniformed police officer, should be the law. The appellate court recognized that no case law exists in Florida to support that premise but numerous States, including Florida, have promulgated statutes which makes the protection of police officers a valid objective. Florida has no statute or rule which would allow an appellate court to so rule that if the policer officer is a victim, the sentencing court can depart from the guidelines.

CONCLUSION

It is urged that this Court strike as an usurpation of this Court's power to promulgate rules of procedure, the Appellate Court's statement that a defendant who chooses to make a police officer acting in the line of duty the victim of his crime is to be treated different than a defendant who commits the same crime upon an ordinary citizen. Further, based upon logic and reason and citation to Rule 3.701 F.R.Cr.P. and the cases attendant thereto, the certified question should be answered as follows:

> When an Appellate Court is faced with reasons that are impermissible and others that are in doubt, the Appellate Court must examine those doubtful reasons in light of the purposes and principles of Rule 3.701(b) before determining whether the reasons are clear and convincing in order to support a departure from a prescribed sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed this _____ day of June, 1985, to the Attorney General's Office, 401 N. W. 2nd Avenue, Room #820, Miami, Florida.

BY: Harold Mendelow
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