

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,963

THE STATE OF FLORIDA,

Petitioner,

vs.

TERRENCE A. BAKER.

Respondent.

FILED
SID J. WHITE
JUL 17 1985
CLERK, SUPREME COURT
By: [Signature]
Chief Deputy Clerk

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ON PETITION FOR DISCRETIONARY REVIEW

* * * * *

REPLY BRIEF

JIM SMITH
Attorney General
Tallahassee, Florida

JACKI B. GEARTNER
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Petitioner was the prosecution in the trial court and the Appellee below. The defendant in the trial court, Terrence Baker, was the appellant below and is the Respondent/Cross-Petitioner in this Court.

Parenthetically, the Petitioner apprises this Honorable Court that the Respondent's issues are presented in the reverse order from Petitioner's Brief; Petitioner will respond in the order of its Brief.

STATEMENT OF THE CASE AND FACTS

The Petitioner relies on its Statement of the Case and Facts as presented in its Initial Brief with the following additions:

1. After a jury was sworn but prior to testimony Respondent withdrew his previously entered not guilty plea and pled guilty to all counts as charged with the condition that there be a thirty-four (34) year cap and a presentence investigation. (T.21)

2. The trial court then advised the Respondent that the sentencing guidelines indicated a sentence of seventeen (17) years and the State offered a plea of thirty-four (34) years. (T.23)

3. The trial court then informed the Respondent that it understood Respondent accepted the plea as follows:

That you will be entering a plea of guilty to all six charges, that there will be a presentence investigation in this case, and that the maximum sentence that you can receive is the original plea offer from the State of 34 years in the State Penitentiary, with a three year minimum mandatory provision as to Count V, the attempted first degree murder ...

(T.23).

4. Respondent then replied that the foregoing was indeed his understanding of the plea. (T.23)

5. Later during the same hearing the trial judge once again inquired of Respondent:

Do you understand, sir, that the plea offer from the State was 34 years, that you are entering a plea to a cap of 34 years and that you could receive no more than 34 years.

THE DEFENDANT: Yes.
(T.28).

6. The trial court found that Respondent entered into the plea freely, voluntarily and intelligently. (T.29)

ARGUMENT

I

QUESTION CERTIFIED

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIES UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CRIM.P. 3.701 IN MAKING ITS DECISION TO DEPART FROM THE GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR RESENTENCING?

Petitioner respectfully relies upon the argument and authorities presented in its Initial Brief as to this point.

ARGUMENT

II

THE FACT THAT A VICTIM WAS A UNIFORMED POLICE OFFICER ENDEAVORING TO ARREST DEFENDANT WHEN SHOT BY DEFENDANT WITH THE OFFICER'S OWN GUN IS A VALID CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES.

Petitioner respectfully apprises this Honorable Court that the only matter properly before it is the Certified Question.

The Third District Court of Appeal, in its opinion, found no Florida case directly holding that a victim who was a uniformed police officer was used as a reason to justify guideline departures; however, the Court went on to state that there is "no reason why a court may not validly pronounce as a reason for departing from sentencing guidelines that a defendant who chooses to make a police officer acting in the line of duty the victim of the crime is to be treated differently than a defendant who commits the same crime upon an ordinary citizen." (Emphasis added). Baker v. State, ____ So.2d ____, 10 FLW 852 (Fla. 3d DCA April 5, 1985).

The District Court of Appeal, Fourth District, held, in Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984), that although a court may depart from the guidelines for "clear and convincing

reasons", there is no definition in the guidelines or any Florida Court as to what constitutes "clear and convincing reasons." However, the Mischler court did state:

Clear and convincing reasons for departure have been held in Florida to include violation of probation, repeated criminal convictions, crime "sprees" or "binges", "careers" of crime, extraordinary mental or physical distress implicated on the victim and extreme risk to citizens and law enforcement officers. (Emphasis added)

Respondent's reliance on State v. Lott, 186 So.2d 565 (Fla. 1973); State v. Bryant, 276 So.2d 184 (Fla. 1st DCA 1973) and Article V, Section 2(a) of the Florida Constitution is misplaced and erroneous. Respondent has interpreted the Third District Court's decision as announcing a rule of law; this, in reality, is not what the opinion or the Court expressed. The Court merely suggests that "the protection of police officers is a valid societal objective which justifies legislation making police officers a special class of crime victim" while holding that the fact that a police officer who, in endeavoring to affect an arrest, becomes a victim "is a clear and convincing reason for departing from the guidelines. Baker v. State, _____ So.2d _____, 10 FLW 852 (Fla. 3d DCA April 5, 1985). Nowhere in the guidelines are there "rules of law" as to exactly what constitutes "clear and convincing reasons" for departure but to imply that for each reason there must be legislation or a specific "rule of law" is ludicrous. Nowhere in

its opinion did the Third District Court "promulgate," "rescind" or "modify" a rule. Therefore, the decisions cited by the Respondent are not applicable.

Arguendo, Petitioner respectfully reminds this Honorable Court that the sentence imposed was also the result of a negotiated plea. The declared policy of this state is to encourage plea negotiations and agreements. Fla.R.Crim.P.3.171(a), Bell v. State, 435 So.2d 478 (Fla. 2d DCA 1984). In this instant case, Respondent accepted a plea, knowing and understanding that the maximum sentence he could receive was thirty-four (34) years in the State Penitentiary with a three (3) year minimum mandatory provision as to Count V, the attempted first degree murder charge (T.23). In Bell, supra, the court held ". . . a departure from the guidelines is clearly warranted when there is a plea bargain which specifies the permissible sentence . . . the appellant was bound by his contract." This Honorable Court has long noted that "a bargained guilty plea is in large part similar to a contract between society and the accused, entered into on the basis of a perceived mutuality of advantage." State ex rel Miller v. Swanson, 411 So.2d 875, 877 (Fla. 2d DCA 1981). Moreover, the court in Key v. State, 452 So.2d 1147 (Fla. 5th DCA 1984), a case which appears directly on point, most succinctly stated:

A negotiated plea which includes an agreement that the defendant may be sentenced to imprisonment for a period of time in excess of the new sentencing guidelines (although within the minimum and maximum sentence limitations provided by law) is a clear and sufficient reason for departure from those guidelines. See, Fla.R.Crim.P. 3.701(b)(6).

In sum, the trial judge relied upon one valid reason and the accepted plea negotiation, as well as four invalid reasons to support his departure from the guidelines and concomitant imposition of sentences within the statutory parameters for the convicted offenses. See, Florida Statutes §775.082. Accordingly, the decision of the lower tribunal should be quashed and the judgments and sentence imposed by the trial court should be affirmed.

CONCLUSION

This Court, in answering the question certified by the lower tribunal must necessarily determine what constitutes clear and convincing reasons for departure and what standard of review should be applied to sentencing guidelines cases.

Based on recent decisions of the district courts, Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), approved Weems v. State, _____ So.2d _____, 10 FLW 268 (May 10, 1985) and Garcia v. State, 454 So.2d 714, 717, 718 (Fla. 1st DCA 1984), the United States Supreme Court's decision in Lockett v. Ohio, 438 U.S.586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and United States v. Grayson, 438 U.S.41, 98 S.Ct. 2610, 57 L.Ed.2d 582, 591, 592 (1978) and the prescriptions found in Fla.R.Crim.P. 3.701, Petitioner contends that for purposes of departure, the trial court may consider and rely upon plea negotiations and any factors concerning the nature and circumstances of the offense as well as the defendant's background, which is not precluded from consideration by Fla.R.Crim.P. 3.701(d)(6)(11). Bell v. State, supra, State ex rel Miller v. Swanson, supra, Key v. State, supra.

Since the sentencing function has been traditionally recognized as an area where the trial courts exercise discretion

which, until the advent of the guidelines, was almost wholly unbridled, Respondent maintains that the only proper standard of review is whether the trial court, in departing, abused its discretion. Addison v. State, 452 So.2d 955, 956 (Fla. 2d DCA 1984); Garcia v. State, supra; Higgs v. State, 455 So.2d 451, 453 (Fla. 5th DCA 1984); Albritton v. State, _____ So.2d _____ (Fla. 5th DCA 1984), 9 FLW 2088; Murphy v. State, 459 So.2d 337 (Fla. 5th DCA 1984); Santiago v. State, _____ So.2d _____ (Fla. 1st DCA 1984), 9 FLW 2479. In applying this standard of review, a well established appellate principle, Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963), Martin v. State, 411 So.2d 987, 989 (Fla. 4th DCA 1982), which has been employed in substance in recent guidelines cases decided by the district courts, Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984), clarified September 7, 1984, Swain v. State, _____ So.2d _____ (Fla. 1st DCA 1984), Mitchell v. State, _____ So.2d _____ (Fla. 1st DCA 1984), 9 FLW 2107, Webster v. State, _____ So.2d _____ (Fla. 2d DCA 1984), 9 FLW 2419, Albritton v. State, _____ So.2d _____ (Fla. 5th DCA 1984), 9 FLW 2088, Higgs v. State, supra, Hankey v. State, _____ So.2d _____ (Fla. 5th DCA 1984), 9 FLW 2212, Mincey v. State, _____ So.2d _____ (Fla. 1st DCA 1984), 9 FLW 2341, Whitlock v. State, _____ So.2d _____ (Fla. 5th DCA 1984) and Johnson v. State, _____ So.2d _____ (Fla. 1st DCA December 21, 1984), dictates that where a trial judge's departure from the sentencing guidelines is predicated upon at least


one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense, the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons.

Accordingly, Petitioner respectfully urges this Court to quash the decision of the lower court, affirm Respondent's judgements and sentences, and answer the certified question as follows:

WHEN A TRIAL JUDGE'S DEPARTURE FROM THE SENTENCING GUIDELINES IS PREDICATED UPON AT LEAST ONE CLEAR AND CONVINCING REASON AND THE SENTENCE IMPOSED IS WITHIN THE STATUTORY PARAMETERS FOR THE CONVICTED OFFENSE, THE SENTENCE MUST BE AFFIRMED NOTWITHSTANDING THE PRESENCE OF ONE OR MORE IMPERMISSIBLE REASONS.

RESPECTFULLY SUBMITTED, on this 3rd day of July, 1985,
at Miami, Dade County, Florida.


JIM SMITH
Attorney General



JACKI B. GEARTNER
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to HAROLD MENDELOW, Special Assistant Public Defender, 2020 N.E. 163rd Street, Suite 300, North Miami Beach, Florida, this 3rd day of July, 1985.


JACKI B. GEARTNER
Assistant Attorney General

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