IN THE SUPREME COURT OF FLORIDA

RANDY VON CARTER,

PETITIONER,

-VS- CASE NO. 67,093

STATE OF FLORIDA,

RESPONDENT.

BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Randy Von Carter will be referred to as "petitioner." The State will be referred to as "the State" or "respondent." References to the record will be indicated by the letter "R". References to the July 27, 1983, trial and sentencing hearing will be indicated by the letter "T". References to the supplemental record will be indicated by the letters "SR".

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case provided on pages two through four of petitioner's brief, with the following addition:

In its original opinion, the First District found that in addition to the age of the victim (an 86 year old female who lived alone), there was another valid reason for departure: the manner in which the crime was carried out indicated premeditation. On rehearing filed by petitioner, the First District struck that portion of their earlier opinion and held that in accordance with Carney v. State, 458 So.2d 13 (Fla.1st DCA 1984) and Knowlton v. State, 466 So.2d 278 (Fla.4th DCA 1985) premeditation is not a proper factor for departure. In all other respects, petitioner's motion for rehearing was denied.

STATEMENT OF THE FACTS

Respondent accepts the Statement of the Facts provided on pages five through six of petitioner's brief, with the following additions:

Michael Sellars testified that on the day of his arrest, in appellant's presence, he told the sheriff that Swain was the other man involved instead of telling the sheriff the truth (that petitioner Carter was the other man involved) because petitioner made a threatening gesture which intimidated Sellars (TR 87-88).

SUMMARY OF ARGUMENT

A departure sentence can be upheld on appeal if it is supported by any valid clear and convincing reason, without the necessity of a remand in every case. This is true even though other improper reasons may be included as reasons for the departure. When a trial judge's departure from the guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameter for the convicted offense, the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons. To hold otherwise would inhibit a trial judge in listing all reasons considered for departure, as it would compel the trial judge to list only those reasons which have been deemed appropriate in other cases by appellate courts, thus limiting the spectrum of reasons available for use. Trial judges, not wishing to offend the appellate courts but at the same time wishing to avoid the time and expense of subsequent re-sentencing hearings, may be forced to choose only those reasons for departure which have already withstood appellate sentencing in other, unrelated cases. This result directly infringes on the inherent discretion of sentencing courts. In this respect, the decisions of the First District have exalted form over substance and have literally transformed the First District into an impregnable citadel of technicality, by mandating automatic reversals in cases where the ratio of valid reasons versus invalid reasons for departure appears "unbalanced" to that court.

This certified question is presently before this Court in the following cases (all from the First District): Young v. State, Case No. 66,257; Brooks v. State, Case No. 66,137; State v. Carney, Case No. 66,163; State v. Burch, Case No. Wade v. State, Case No. 66,957; and in Albritton v. State, Case No. 66,169 from the Fifth District. This question has been certified as being of great public importance in Baker v. State, 466 So.2d 1144 (Fla.3rd DCA 1985); Williams v. State, 10 F.L.W. 1563 (Fla.1st DCA, June 25, 1985); and Griffin v. State, 10 F.L.W. 1401 (Fla.2d DCA June 7, 1985).

Since the departure is valid if based on any valid reason, the sole reason for departure found valid by the First District in this case is sufficient to uphold the sentence as imposed by the trial court.

ISSUES ON APPEAL

ISSUE I

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CR.P. 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 DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR RESENTENCING?

ISSUE II

THE FIRST DISTRICT COURT OF APPEAL DID NOT ERR IN HOLDING THAT THE FACT THAT THE VICTIM WAS AN 86 YEAR OLD FEMALE WHO LIVED ALONE WAS A LEGITIMATE FACTOR JUSTIFYING DEPARTURE FROM THE RECOMMENDED GUIDELINE SENTENCE.

ISSUE I

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CR.P. 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 DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR RESENTENCING?

ARGUMENT

Respondent's position is that in every departrue case, references by the trial judge to impermissible reasons for departure does not vitiate valid reasons for departure listed by the trial judge. As long as at least one valid reason for departure is present, it is irrelevant whether other reasons listed are impermissible. In other words, 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 offense, the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons.

Where there is fair support in the record for one or more rational reasons advanced by the trial judge as a basis for imposition of a sentence outside of the guidelines recommended range, it cannot be said that the trial judge abused his discretion in departing, and thus the sentence should be affirmed. This

proposition is based on the well established principle of appellate law that where a trial judge's order, judgment or decree is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been bottomed on an erroneous theory, an erroneous reason, or an erroneous ground, the order, judgment or decree will be affirmed. See, Stuart v. State, 360 So.2d 406 (Fla.1978) on remand 360 So.2d 498; Robinson v. State, 393 So.2d 33 (Fla.1st DCA 1981); Owens v. State, 354 So.2d 118 (Fla.3rd DCA 1978); State v. Alvarez, 258 So.2d 24 (Fla.3rd DCA 1972); Gaines v.State, 172 So.2d 887 (Fla.2d DCA 1965); Savage v. State, 156 So.2d 566 (Fla.1st DCA 1963), cert.denied, 158 So.2d 518 (Fla.1963); Also see Trenary v. State, 423 So.2d 458 (Fla.2d DCA 1982). The district courts of this State have upheld departures where the trial courts relied upon permissible as well as impermissible reasons for departure. See Albritton v. State, 458 So.2d 320 (Fla.5th DCA 1984) review pending, FSC Case No. 66,169; Webster v. State, 461 So.2d 965 (Fla.2d DCA 1985); Marshall v. State, 10 F.L.W. 490 (Fla.2d DCA Feb. 22, 1985); Ragan v. State, 10 F.L.W. 936 (Fla.2d DCA April 10, 1985); Brinson v. State, 463 So.2d 564 (Fla.2d DCA 1985); Davis v. State, 458 So.2d 42 (Fla.4th DCA 1984); Higgs v. State, 455 So.2d 451 (Fla.5th DCA 1984); Williard v. State, 462 So.2d 102 (Fla.2d DCA 1985). In Albritton v. State, supra, the court explained the rationale:

> The defendant also argues that where some of the reasons given by the trial judge for departure are inadequate or impermissible and other reasons given are authorized and valid reasons this court should not merely affirm but must remand for the trial court

> to consider the matter and determine if it would depart solely on the basis of the good reasons given. We do not agree. We assume the trial judge understood his sentencing discretion and understood that the mere existance of "clear and convincing reasons" for departing from the sentencing guidelines never requires the imposition of a departure sentence and that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible. Accordingly, a departure sentence can be upheld on appeal if it is supported by any valid ("clear and convincing") reason without the necessity of a remand in every case. This assumption in the trial judge's continuing belief in the propriety of a departure sentence is especially safe in view of the trial court's great discretion under Fla.R.Cr.P. 3.800(b) to reduce or modify even a legal sentence imposed by it within sixty days after receipt of an appellate mandate affirming the sentence on appeal.
> (footnotes omitted, emphasis added).

458 So.2d at 321.

And, in Webster v. State, supra, the court held that

> [a[sentence departing from the guidelines can be upheld on appeal where supported by any valid clear and convincing reasons even though other improper reasons may be included. It is unnecessary to remand for resentencing, and the judgment and sentence are therefore affirmd. (Emphasis added).

461 So.2d at 966.

Thus, 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. To hold otherwise would inhibit the listing of all reasons considered by the trial judge to consitute a bona fide basis for departure in the particular case and have the insalubrious effect of compelling the trial judge to search for and list only those reasons

enjoying judicial approval in an effort to insure that his sentencing decision will withstand appellate scrutiny. This result would make a mockery of the guidelines and assign the highest priority to form rather than substance.

At this point, Respondent notes that the lower court, in affirming the instant case, evidently relied upon the reasoning set forth in its opinion in Carney v. State, 458 So.2d 13 (Fla.1st DCA 1984), review pending, FSC Case No. 66,163. There the court declined to adopt a per se rule of reversal in every instance in which permissible and impermissible reasons for departure are stated by the trial judge and held:

> We think a more appropriate rule--one which would allow greater flexibility to the trial court, but still preserve the substantial rights of the accused to have meaningful appellate review of a sentence outside the guidelines--would be to affirm the trial court's sentencing departure where impermissible as well as permissible reasons for departure are stated, where the reviewing court finds that the trial court's decision to depart from the guidelines, or the severity of the sentence imposed outside the guidelines, would not have been affected by elimination of the impermissible reasons or factors stated. A similar standard for review has been adopted by the Florida Supreme Court in death penalty cases where valid as well as invalid aggravating factors have been considered by the trial court.

While unquestionably in agreement with the result reached in the instant cases, Respondent nevertheless urges this Court to reject the rule announced in Carney and the lower court's application thereof in the cases sub judice because the statutorily required "weighing process" involved in capital

cases, Florida Statutes §921.141, is not mandat4d by either Florida Statutes §921.001 or Fla.R.Crim.P. 3.701.

As previously stated, the sentencing guidelines are meant to aid the judge in his sentencing decision. If by "clear and convincing reason" the judge, in his discretion, departs from the recommended guideline sentence range, he may do so when the reasons are articulated in writing and supported by the record. Only the judg's discretion is involved and that standard used by the judge in exercising his discretion is less strict than in death cases. By comparison, in death penalty cases, the judge conducts a "weighing process" of the statutory aggravating circumstances proved "beyond a reasonable doubt" with the statutory and non-statutory mitigating factors presented by the defendant. In those cases where there are no mitigating circumstances or only a relatively minor mitigating circumstance such as the age of the defendant, this Court has upheld the sentence of death, if, after disregarding the invalid aggravating circumstances, there remained at least one valid aggravating circumstance. See Straight v. State, 397 So.2d 903 (Fla. 1981), cert.denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); Booker v. State, 397 So.2d 910 (Fla.1981); Hardwick v. State, 9 F.L.W. 484 (Fla.1984); Rose v. State, ___ So.2d ___ (Fla.1984), Case No. 63,996, December 6, 1984). This Court has noted that even in death cases it is within the trial judge's discretion to decide in each case whether a

particular mitigating circumstance was proved and weight to be given. See Lemon v. State, 9 F.L.W. 308 (Fla.1984); Dougherty v. State, 419 So.2d 1067 (Fla.1982), cert.denied, ___ U.S. ___, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); Riley v. State, 413 So.2d 1173 (Fla.1982), cert.denied, 459 U.S. 981, 102 S.Ct. 773, ___ L.Ed.2d ___ (1982); Smith v. State, 407 So.2d 894 (Fla.1981); cert.denied, 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982). Only in those cases where aggravating as well as a substantive mitigating circumstance is present and this Court finds some of the aggravating circumstances invalid, does the case sometimes get remanded for renentencing. See Booker, supra; Basset v. State 449 So.2d 803 (Fla.1984); Jackson v. State, 366 So.2d 752 (Fla.1978), cert.denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). The purpose of the remand is to allow the trial judge an opportunity to "reweigh" the remaining valid aggravating circumstances with the mitigating ones.

Therefore, it is abundantly clear that one cannot compare the sentencing "discretion" of a judge in a non-death sentencing guidelines case with the "weighing process" involved in death penalty cases. This is especially so in light of the absence of a mandated weighing process in either the enabling legislation or the guidelines themselves. Thus, Respondent again submits that where the trial judge has set forth at least one permissible reason for departure, the presence of one or more impermissible reasons should not militate against affirmance.

Petitioner, on the other hand, asserts that this Court should adopt a per se rule of reversal when permissible as well as impermissible reasons are relied upon by the trial court for departure since the reviewing court is not in a position to determine to what degree the trial court's reliance on the impermissible reasons influenced the extent of his departure. In short, Petitioner argues that in addition to the propriety of departure, the appellate courts should also review the extent of the departure.

As noted above, the Fifth District refused to second-guess the trial judge's "continuing belief" in the propriety of a departure even though some, but not all, of the reasons relied upon were impermissible. But more importantly, that court has emphatically refused to become involved in appellate sentencing--a practice suggested by petitioner's position that the extent of departure should be of interest to appellate courts in carrying out their newly created duty of limited sentencing review prusuant to Florida Statutes §921.001(5).

In Albritton v. State, supra, the court recognized that the Florida sentencing guidelines place no restrictions on a departure sentence, hence the only lawful limitation on a departure sentence is the maximum statutory sentence authorized by statute for the offense in question. Id. at 9 F.L.W. 2089. Subsequently, in Whitlock v. State, ___ So.2d ___ (Fla.5th DCA 1984), 9 F.L.W. 2390, the trial court departed from the presumptive sentence and imposed a sentence

of five years imprisonment. The Fifth District fould that the reasons given by the trial court justified departure and affirmed holding:

> Once there exists clear and convincing reasons to depart from the guidelines, we do not think the appellate courts have jurisdiction to review the extent of departure, so long as the length of the sentence is one permissible under the criminal statutes. Since Whitlock's crime for which he was convicted carries a maximum sentence of five years, we must affirm.

Id. at 9 F.L.W. 2390.

The foregoind decisions are consistent with this Court's decision in Banks v. State, 342 So.2d 469 (Fla.1976), holding:

> . . . this Court has long been committed to the proposition that if the sentence is within the limits prescribed by the Legislature, we have no jurisdiction to interfere.

Id. at 470. Accord Brown v. State, 13 So.2d 458 (Fla.1943), Weathington v. State, 262 So.2d 724 (Fla.3rd DCA 1972), cert. denied, 265 So.2d 330 (Fla.1972), cert.denied, 411 U.S. 968 (1973). Furthermore, the absence of provision for appellate review of the extent of departure where the Legislature specifically proviced for appellate review of the propriety of departure, Florida Statutes §921.001(5), serves as a clear indication that the Legislature intended that the trial court's exercise of its inherent sentencing discretion should remain inviolate in terms of appellate interference, once a departing sentence had been determined to have been imposed in conformity with the requirements of Fla.R.Crim.P. 3.701. Respondent therefore contends that although Florida Statutes §921.001(5) and §924.06(e) provide

for appellate review of sentences imposed without the guidelines range, if properly preserved, such review must necessarily be limited to evaluation of the trial court's conformity to the procedures for departure pursuant to Fla. R.Crim.P. 3.701, and should not be extended to matters which have been consistently held to be not subject to appellate review. In sum, once a valid reason for departure has been found, appellate inquiry ceases.

ISSUE II

THE FIRST DISTRICT COURT OF APPEAL DID NOT ERR IN HOLDING THAT THE FACT THAT THE VICTIM WAS AN 86 YEAR OLD FEMALE WHO LIVED ALONE WAS A LEGITIMATE FACTOR JUSTIFYING DEPARTURE FROM THE RECOMMENDED GUIDELINE SENTENCE.

ARGUMENT

The fact that the victim in this case was an 86 year old woman who lived alone is a sufficient reason for departure. The First District's opinion is not in conflict with Knowlton v. State, 466 So.2d 278 (Fla.4th DCA 1985) on this point because in Knowlton the court explained that the victim's age, without more, was an insufficient reason for departure. Put simply, in this case the First District was faced with more than merely the age of the victim; the court was faced with an 86 year old woman who lived alone and was the victim of a burglary and robbery in her home. In Moore v. State, 10 F.L.W. 1200 (Fla. 3rd DCA May 14, 1985), the court found as a sufficient and valid reason for departure the fact that the victim was over eighty years old and living alone. Petitioner has failed to show any express conflict with Knowlton, supra.

CONCLUSION

For the above discussed reasons, this Court should answer the certified question by holding that where a valid reason for departure exists, the appellate court should not reverse or remand for resentencing simply because the trial judge listed other reasons for departure which are impermissible reasons.

Therefore, the First District erred in remanding for resentencing since a valid reason for departure was determined to have been considered by the trial judge as a reason for departure.

Resepctfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been forwarded to Mr. David A. Davis, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 9th day of July 1985.

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