

No Request Case

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 PAUL JOSEPH COTE,)
)
 Respondent.)
 _____)

CASE NO. 67,166

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellant and the defendant and Petitioner was the Appellee and the prosecution in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbols will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts at bar with the following addition and clarification.

On appeal to the Fourth District Court of Appeal Respondent argued that the trial court reversibly erred in departing from his presumptive guideline sentence. In addition, Respondent argued that the trial court erred in failing to state the grounds for departure in a written statement. See Cote v. State, 468 So.2d 1019, 1020 (Fla.4th DCA 1985) (See Appendix).

SUMMARY OF THE ARGUMENT

POINT I

In State v. Jackson, 10 FLW 564 (Fla. October 17, 1985), this Court adopted the Fourth District Court of Appeal's analysis in Boynton v. State, 473 So.2d 703 (Fla.4th DCA 1985), requiring the trial court to provide written reasons for departure from a guideline sentence. Thus the Fourth District Court of Appeal decision in the present case so mandating must be affirmed.

POINT II

The trial court's order of departure from Respondent's presumptive guideline sentence was affirmed by the appellate court. The basis of the departure was the psychological trauma to the victim in this case. Appellant pled guilty to armed burglary and aggravated assault. Under Florida law, an essential element of the crime of aggravated assault is that the defendant create a "well-founded fear" in the other person. Hence the causing of fear and thereby the creation of psychological trauma is by statutory definition an essential element or component of the crime of aggravated assault for which Respondent was convicted. It is erroneous, unfair and improper under the Rule 3.701 to depart from a defendant's presumptive guideline sentence or the basis of an element of the charged. Also, Respondent contends that psychological trauma "is not a clear and convincing" reason for departure. The trial court's order of departure from Respondent's presumptive guideline sentence must be reversed.

ARGUMENT

POINT I

A TRIAL COURT ERRS ON DEPARTING FROM THE SENTENCING GUIDELINES WITHOUT STATING ITS JUSTIFICATION THEREFOR IN WRITING.

The ground has been cut from under Petitioner's position by this Court's decision in State v. Jackson, 10 FLW 564 (Fla. October 17, 1985), holding that the trial court is required to state in writing its reasons for departing from a guidelines sentence. Thus, the Fourth District Court of Appeal's decision in the present case so mandating must be affirmed. See also Boynton v. State, 473 So.2d 703 (Fla.4th DCA 1985).

POINT II

THE TRIAL COURT REVERSIBLY ERRED IN DEPARTING
FROM RESPONDENT'S PRESUMPTIVE GUIDELINE
SENTENCE.

Since this Honorable Court has accepted jurisdiction over this cause to resolve the legal issue in conflict it may also in its discretion, consider other issues properly raised and argued. See Savoie v. State, 422 So.2d 308, 310 (Fla. 1982).

The trial judge articulated the following basis for departure:

On the other hand, what took place here obviously, you know, I could just place myself in the victim's situation, where it is 10:00 o'clock at night. She is sitting home with the baby.

Apparently, the defense attorney thought it would be in his client's best interest, knowing if the jury listened to the facts, they would return a verdict of guilty. But I can place myself in a situation of a wife sitting at home with her infant, and all of a sudden, at 10:00 o'clock at night, someone is breaking through a glass door with a pole in his hand, and glass is breaking all over the place. The baby is crying. They run into a bedroom. She screams and he is saying he is going to kill her husband. This is like a scene out of a movie. We never expect something like that to be factual and happen to us, but unfortunately, it happened to this lady. I can empathize with her and her baby and the traumatic psychological and emotional experience this would have to them. If the husband had been home at the time, if he were home, probably he could have prevented this or curbed it before it got carried away. He is equally upset, you know, he exhibits love and concern for his wife and child. He is quite upset about what happened. So those are the facts you have to bear in mind.

The State is coming in and asking for the sentence to be aggravated in view of the long term and emotional and psychological circumstances to this victim of this crime.

Okay. I am going to sentence the defendant to a period of incarceration in the Florida State Prison of four years.

Cote v. State, supra at 1020.

The Fourth District in this cause held that the trial court did not err in departing from Respondent's guideline sentence.

The Court stated:

We recognize that assault, by definition, requires a well-founded fear that violence is imminent, and that some degree of psychological trauma is already embodied in the guidelines' recommended sentencing range for assault. However, as we stated in Davis v. State, 9 FLW 2221 (Fla.4th DCA Oct. 17, 1984), where "[t]he facts show something more than a simple robbery [assault]," a trial judge may properly exercise his discretion in departing from the guidelines. Based on the facts of the case sub judice, we do not find an abuse of discretion.

Id., at 1020-1021.

Respondent contends that the trial court reversibly erred in departing from the Rule 3.701 presumptive guideline sentence at bar. The facts of this case do not provide a sufficient clear and convincing reason for departure from the presumptive guideline sentence should be reversed by this Honorable Court.

In Hendrix v. State, 10 FLW 425 (Fla. August 29, 1985), this Honorable Court recently held that a defendant's prior criminal convictions may not be considered as reasons for departure from the sentencing guidelines, where the prior criminal record was taken into account in determining the presumptive sentence under the guidelines. This Court held:

In the instant case the trial judge departed from the guidelines based on the defendant's prior criminal convictions. This was not a proper reason for departing. The guidelines

have factored in prior criminal records in order to arrive at a presumptive sentence. Fla.R.Crim.Pro. 3701(b)(4), (d)2-5.. Hendrix received 12 points for his prior convictions, out of a total of 25 for the offense for which he was convicted. 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 for purposes of furthering the goal of uniformity." Burch v. State, 462 So.2d 548, 549 (Fla.1st DCA 1985).

Therefore, we hold that the trial judge erred in considering the defendant's prior convictions as a reason for departing from the guidelines.

Recently in Wiggins v. State, Case No. 84-2365 (Fla.4th DCA, September 25, 1985), Judge Barkett, now Justice Barkett, writing for the Fourth District Court of Appeal held that when "victim injury" is scored, in the defendant's scoresheet this does not additionally justify departing from the presumptive guideline sentence.

Under Florida law, an essential element of the crime of assault and aggravated assault is that the defendant create a "well-founded fear" in the other person. Section 784.011(1), 784.021, Fla. Stat. (1984). See Cruce v. State, 350 So.2d 518 (Fla.4th DCA 1977). Hence the causing of fear and thereby

creation of psychological trauma is by statutory definition a component or essential element of the crime of aggravated assault for which Respondent was convicted.

In Smith v. State, 10 FLW 2370 (Fla.1st DCA 1985), the defendant was convicted of burglary of a dwelling and sexual battery. The trial judge specified six (6) reasons for departure from the defendant's presumptive guideline sentence. Ground number four (4) for departure was: "Emotional, as well as physical trauma, suffered by a victim." The First District held that ground number four (4) was an improper basis for departure. The Court stated: "Likewise, reason number 4 has previously been found invalid where as here, the trauma to which the trial court refers is inherent in the nature of the offense. Brooks v. State, 456 So.2d 1305 (Fla.1st DCA 1984), approved 10 FLW 479 (Fla. August 29, 1985)."

A departure from the probationer's guideline sentence based on an essential element of the crime charged is nothing more than allowing a trial judge to depart from the presumptive guideline sentence on the basis of a factor already weighed in arriving at the presumptive guideline sentence. To allow a trial judge to depart from the presumptive guideline sentence on the basis of an element of crime would sanction the obliteration of the concept of a presumptive guideline sentence with a departure representing the exception to the rule.

The sentencing guidelines embody the following principles under Fla.R.Crim.P. 3.701(b)(6):

6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

(emphasis supplied).

Any departure from the guideline sentence must be in accordance with Fla.R.Crim.P. 3.701(d)(11):

11. Departures from the guideline sentence: Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

The guidelines do not define "clear and convincing reasons" for departure. However, case authority offers instructive discussion of "clear and convincing evidence". In Slomowitz v. Walker, 429 So.2d 797, 800 (Fla.4th DCA 1983), the Court held that clear and convincing evidence is evidence "...of such a weight that it produces in the mind of the trier of fact a firm belief or conviction without hesitancy as to the truth of the allegations sought to be established." The standard for departing from the guidelines is one of "clear and convincing reasons..." which "...should be articulated in writing. Moreover, departures from the guideline sentence should be avoided in the absence of "clear and convincing" reasons. Rule 3.701(d)(11). See also: Section 921.001(4) (referring to the guideline sentence as "presumptive").

At bar, the trial judge (see supra) did articulate various factors involved in the crime and its impact on the victim. However, the trial judge failed to state "clear and convincing" reasons for departure. An element of a crime cannot logically be a proper basis for departures from the presumptive guideline sentence. In Carney v. State, 458 So.2d 13 (Fla.1st DCA 1984), aff'd. State v. Carney, 10 FLW 479 (Fla. August 29, 1985), the defendant pled nolo contendere to the charge of armed robbery. The First District held that the following ground for departure from Appellant's presumptive guideline sentence was improper:

For example, the factors that "the robbery was premeditated and calculated and for pecuniary gain" and "[that] there was no provocation [for the robbery]" are, practically speaking, an inherent component of any robbery, and hence may properly be viewed as already embodied in the guidelines recommended sentencing range.

Id., at 15.

See also, State v. Hines, 343 N.W.2d 869 (Minn.App.1984) [trial court cannot take element of offense and make it reason for departure]; State v. Young, 312 S.E.2d 665 (N.C.App.1984) [judge's reason for departure could not be considered since crime she was convicted of is based on relationship of parent and child, and that relationship cannot be used again to exceed presumptive sentence]. Various factors have already been included in the weighing of the scored factors under the guidelines:

"Weighting the factors is designed to add a measure of uniformity to the sentencing process and thereby eliminate unwarranted sentences variation. The weights are unique to each offense category and relate only to those offense contained within that category."

Fla.R.Crim.P. 3.710 (II: Guidelines Scoresheet, introduction) (emphasis added).

Patently, if the same factor is used to depart from a guideline sentence as was used to set the guideline sentence in the first place, the exercise of setting a guideline has been rendered nugatory: why bother to carefully calculate a sentencing range based on specific factors, when any trial judge can then recalculate the entire equation based on exactly the same input? The result of such a process will be to nullify the fundamental purpose of the guidelines, "to eliminate unwarranted variation in the sentencing process." See Rule 3.701(b).

The courts of this state have applied similar analysis in refusing to countenance, for example, the Parole Commission's utilization of an element included within the crime for which sentence was imposed, which consequently formed the basis for computing the offender's presumptive parole release date, as a reason for aggravating that date, Mattingly v. Florida Parole and Probation Commission, 417 So.2d 1163 (Fla.1st DCA 1982); Jacobson v. Florida Parole and Probation Commission, 407 So.2d 611 (Fla.1st DCA 1981). See also, Province v. State, 337 So.2d 783, 786 (Fla. 1976), in which this Court held that it was improper to consider the same factor twice in aggravation of a defendant's death sentence. In the Rule 3.701 sentencing guidelines context, the First District Court of Appeal reached the same conclusion. See Carney v. State, supra; Smith v. State, supra.


Respondent further contends that "psychological trauma" is an improper basis to depart from any presumptive guideline sentence regardless of the crime charged. Fla.R.Crim.P. 3.701(b). All crimes by definition would have some type of psychological trauma to the victim. In part that is why the defendant's behavior has been proscribed. "Psychological trauma" could become a "catch-all" ground to depart in every case. There was no expert testimony or psychological reports submitted to identify or quantify the psychological trauma involved at bar. Psychological trauma is being inferred from the incident. The guidelines expressly score for "victim injury" hence psychological injury can not be scored or thereby used to depart from the presumptive guideline sentence. An anomalous situation would develop where the trial judge would have to score for severe physical injury to the victim but if he finds the slightest degree of psychological trauma to said victim he could "depart" from the presumptive guideline sentence and sentence the defendant to the maximum sentence without any possibility of parole. This is clearly in violation of the sentencing guidelines. Consequently, the trial judge's stated justification in the instant case for its sentencing departure on grounds which were inherent in the nature of the crime for which Respondent stood convicted was improper. Therefore the Fourth District's decision at bar affirming the trial court's order departing from Respondent's presumptive guideline sentence must be reversed and the cause remanded to the trial court for imposition of the presumptive guideline sentence.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Respondent requests this Honorable Court to reverse only that portion of the decision of the Fourth District which affirmed the trial court's order of departure from Respondent's presumptive guideline sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to ROBERT TEITLER, Assistant Attorney General, Room 704 Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, FL 33401, this 31st day of October, 1985.



Of Counsel