IN THE SUPREME COURT OF FLORIDA

DONNA HARRIS GRIFFIN, a/k/a
DONNA GRIFFIN HARRIS, :

Petitioner, :

vs. : Case No. 67,224

STATE OF FLORIDA, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

MICHAEL E. RAIDEN
ASSISTANT PUBLIC DEFENDER

Hall of Justice Building
455 North Broadway
Bartow, FL 33830
(813) 533-1184; 533-0931

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued) PAGE NO.

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

DONNA HARRIS GRIFFIN,
a/k/a DONNA GRIFFIN HARRIS, :

Petitioner, :

vs. : Case No. 67,224

STATE OF FLORIDA, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner DONNA HARRIS GRIFFIN, a/k/a DONNA GRIFFIN HARRIS, was the Appellant in the Court of Appeal and the Defendant in the trial court. Respondent was the Appellee in the District Court and the Plaintiff/Prosecution in the trial court.

STATEMENT OF THE CASE AND FACTS

On February 29, 1984, an information was filed in the Circuit Court of the Tenth Judicial Circuit, Polk County, charging Petitioner DONNA HARRIS GRIFFIN, a/k/a DONNA GRIFFIN HARRIS, with kidnapping and armed robbery, violations of Sections 787.01 and 812.13, Florida Statutes (1983). (R9-11) Petitioner entered a plea of nolo contendere to both charges May 22, 1984, before Circuit Court Judge Oliver L. Green, Jr. (R80)

On July 25, 1984, Petitioner was sentenced to concurrent terms of thirty years in prison, with credit for 166 days served. (R110-112) The presumptive sentence under the guidelines was 9 to to 12 years. (R113) As grounds for departure, the trial court cited the probability the victim would have been murdered had he not escaped, the psychological and physical impact of the epiosde upon the victim, Petitioner's lack of remorse, and the fact Petitioner had involved members of her family in the offense. (R113-114) Further, the trial court adopted suggestions filed June 5, 1984, by the Assistant State Attorney assigned to the case (R84), which cited the cruelty of the victim's treatment, the detailed planning, the risk of death to the victim, and the large sum of money that the defendants sought to obtain. (R84,114)

Notice of Appeal was filed August 15, 1984. (R121) On June 7, 1985, the Second District Court of Appeal affirmed. Griffin v. State, 10 F.L.W. 1401 (Fla.2d DCA, June 7, 1985). However, following its earlier decision in Brinson v. State, 463 So.2d 564 (Fla.2d DCA 1985), the Court of Appeal certified the following question of great public importance:

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?

On June 14, 1985, Petitioner filed notice of her intent to invoke the discretionary jurisdiction of this Honorable Court. This brief on the mertis follows;

ARGUMENT SUMMARY

When a trial judge, in departing from a guideline sentence, cites criteria that are invalid, the case should be remanded for reconsideration of the sentence imposed. An appellate court should not substitute its judgment for that of the lower court, and attempt the determination whether the sentence should stand notwithstanding the error.

This position is consistent with the historical aversion of appellate courts to re-weigh the discretionary decisions of lower courts. An analogy may be drawn to revocations of probation. Further, it is desirable that guideline decisions be subject to strict scrutiny; their appealability is an inherent part of the guideline sentencing system. Departures from the presumptive sentence should occur only where there exist "clear and convincing" reasons. The broader carte blanche given trial courts to enhance sentences, the less chance the goal of relative sentencing uniformity will be achieved.

In the case at bar, the extent of departure was particularly substantial, and a disproportionate number of the reasons cited were invalid. For these reasons, it is not possible or even advisable to speculate whether the trial judge would have departed, or departed to this extent, regardless of his error.

ARGUMENT

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON IMPERMISSIBLE CRITERIA IN DEVIATING FROM THE SENTENCING GUIDELINES, THE CASE SHOULD BE REMANDED FOR RESENTENCING.

When a sentencing court, in deciding to depart from the presumptive sentence recommended under the guidelines, cites some criteria which properly constitute "clear and convincing reasons" and some which do not, what is the proper course of action for the appellate court reviewing that sentence? It is Petitioner's position that appellate courts should not undertake an independent determination whether those valid criteria, standing alone, would justify the departure. Rather, the case should be remanded for reconsideration of the sentence.

Historically, appellate courts have been averse to substitution their judgment for that of a trial court. The following approach is commonly adopted with respect to violations of probation: where an order of violation cites a mixture of valid and invalid findings, the case is usually reversed unless the record is clear the trial court would have revoked probation solely on the basis of the permissible reasons. See, e.g., Tuff v. State, 338 So.2d 1335 (Fla.2d DCA 1976); Clemons v. State, 388 So.2d 639 (Fla. 2d DCA 1980); Watts v. State, 410 So.2d 600 (Fla.1st DCA 1982).

A similar approach has been taken in some districts with respect to guideline errors. In Young v. State, 455 So.2d 551,552 (Fla.1st DCA 1984), the Court of Appeal found it "impossible to determine whether the trial judge would have come to the same conclusion" solely on the basis of the departure criteria that the appellate court approved. But see, e.g., Higgs v. State, 455 so.2d 451 (Fla.5th DCA 1984), where the guideline departure was affirmed

when only one of the reasons cited was valid. A middle ground was adopted in Carney v. State, 458 So.2d 13 (Fla.1st DCA 1984), wherein the court would affirm upon a finding that the trial judge's decision to aggravate would not be affected by deletion of impermissible criteria.

The Fourth District Court of Appeal has assumed the forefront in placing some restraints upon those trial judges who would depart from the guidelines. In Davis v. State, 458 So.2d 42,45 (Fla.4th DCA 1984), the court concluded that impermissible departure criteria could affect "the extent of the departure" and thus it is "more equitable to reverse and remand for resentencing."

> Cynics may observe that a trial judge upon remand will simply decree the same enhanced punishment for the acceptable reasons. Maybe so and maybe he should. However, he may well not and if the last be possible, simple justice requires that the defendant have his day in court.

Id.

There are sound policy reasons for adopting the position taken in Davis. Guideline sentences are simply different from pre-guideline sentences, in that they are specifically appealable even when they do not exceed the statutorily-decreed maximum penalty. §§921.011(5), 924.06(1), and 924.07(9), Florida Statutes (1983). This appealability is an integral feature of Florida's relatively new, relatively novel sentencing procedure, a per se rule to the effect any one of several reasons justifies departure would effectively hamstring appellate review of guideline decisions.

Among the problems: the Higgs approach encourages a "laundry list" style of sentencing, the enumeration of various and sundry criteria with the hope at least one will "stick." This

practice has already been disapproved in Florida; Alford v. State, 460 So.2d 1000 (Fla.1st DCA 1984); as well as other jurisdictions utilizing sentencing guidelines; Doughtery v. State, 451 N.E.2d 382 (Ind.4th DCA 1983). The Carney opinion suggests that trial judges might wish to rank their departure criteria in order of importance--then, if a reason low on the "pecking order" is stricken, the sentence may remain undisturbed. A likely end result if this formula is endorsed: blanket pronunciamentos by some trial judges that all reasons for departure are of equal gravity, and any will suffice to uphold the end result. This is not unlike the judge who, at a revocation of probation, is prescient enough to state, "I find you guilty individually and collectively." While such an approach is probably permissible, it hints at a rather unsatisfying unwillingness to concede one's possible fallibility. All in all, if guidelines departures are rendered relatively facile, the announced goal of sentence uniformity; Fla.R.Crim.P. 3.701(b); Weems v. State, 451 So.2d 1027 (Fla.2d DCA 1984), affirmed, __So.2d__, 10 F.L.W. 268 (May 9, 1985); is undermined. Minnesota, whose sentencing system is similar to Florida's, has recognized this potential problem. State v. Norton, 328 N.W.2d 142 (Minn.1982).

In the case at bar, the extent of departure was considerable and a good many reasons for departure were cited. At least One, the "severe psychological and physical impact of the episode on the victim" (Griffin, slip opinion, p.2) was found by the Court of Appeal to be both legally valid and amply supported by the record. Cf. Green v. State, 455 So.2d 586 (Fla.2d DCA 1984). The Court of Appeal did not elaborate upon the remaining reasons, except to state there were "some reasons which appear to be of questionable

validity." Id. These merit brief discussion.

Petitioner argued below that all the remaining factors were invalid. Beginning with the allegation Petitioner "involved her family in the transcation" (R113), an analogy was drawn to Wyman v. State, 459 So.2d 1118 (Fla.1st DCA 1984), wherein the defendant was alleged to have induced another to assist in the offense; the Court of Appeal reversed due to the lack of evidence in the record to substantiate the allegation. Similarly, there is no evidence in the instant case that Petitioner involved her family, only that she was arrested at her family residence. (R22)

The trial court also found it was "probable [the victim] would have been murdered" had he not escaped. (R113) It is improper to base enhancement on crimes an accused might have committed. See, e.g., Lindsey v. State, 453 So.2d 485 (Fal.2d DCA 1984); Davis v. State, 458 So.2d 42 (Fla.4th DCA 1984). See generally Fla.R. Crim.P. 3.701(d)(11).

According to the trial court, Appellant expressed absolutely no remorse." (R114) This, too, has been rejected as a proper aggravating circumstance, first in capital cases; Pope v. State, 441 So. 2d 1073 (Fla.1983); and, by analogy, in the guidelines context. Davis v. State, supra; Mischler v. State, 458 So.2d 37 (Fla.4th DCA 1984).

The State Attorney suggested the sentence should be enhanced because Petitioner and her co-defendant sought to obtain a large sum of money from the kidnapping. (R84) The trial court adopted this and all such suggestions. (R113) A similar basis for enhancement was rejected in Mischler v. State, supra, at least where the record fails to reflect (as it does here) that the monetary amount would

cause disproportionate harm to the victim. Also, in the instant case, there was only a demand for, and not receipt of, a large sum of money.

The State further urged that "[a] lengthy sentence is necessary to deter others from committing the same crimes." (R84) This, too, was an impermissible consideration. While individual deterrence may be permissible in certain circumstances, usually involving unrehabilitatable career criminals; Mincey v. State, 460 So.2d 396 (Fla.1st DCA 1984); general deterrence has been rejected as grounds to depart from the guidelines. Williams v. State, 462 So.2d 23 (Fla.4th DCA 1984).

The trial court noted that Petitioner "fully cooperated in the execution of these crimes." (R113) Even if that is true, Petitioner disputes its relevance in the guidelines context. In effect, the court is saying Petitioner is just as guilty as her co-defendant. If the reverse were true, the relevance would be more obvious. A "ringleader" may deserve more punishment than a "follower." Cf. Wyman v. State, supra. Petitioner also foresees appellate court upholding downward departures for co-defendants whose involvement was minimal. But where guilt is shared equally among participants, the fact should not be cited as a reason to enhance the sentence. Merely having an accomplice has been dismissed as irrelevant. Scott v. State, 10 F.L.W. 1189 (Fla.1st DCA, May 14, 1985). Notably, equality of sentence among co-defendants has been rejected as valid grounds for departure. Thomas v. State, 461 So.2d 274 (Fla.5th DCA 1984).

The State also asked the trial court to enhance because Petitioner and her co-defendant armed themselves with firearms. (R84)

This fact was already reflected in the charging instrument (R9-11) and served to reclassify both offenses one degree upward. &775.087, Fla.Stats. (1983). Thus, to further penalize Petitioner for factors inherent in the nature of the offense would constitute "double dipping," which has been disapproved. See, e.g., Baker v. State, 10 F.L.W. 852 (Fla.3d DCA, March 26, 1985). Premeditation, or pre-planning, likewise would constitute "double dipping."

The remaining departure factor, that which was approved by the Court of Appeal, concerns the facts of the offense itself. There is authority to suggest the trial court should not consider "facts relating to the instant offense." Callaghan v. State, 462 So.2d 832 (Fla.4th DCA 1984). However, the position taken in Callaghan appears to be a minority view.

Nevertheless, we should not lose sight of one fact: psychological trauma, "terrorism," or whatever one wishes to call it, is a factor inherent in both kidnapping and robbery, insofar as it is the rare victim who is not traumatized by such conduct, and the legislature has implicitly acknowledged this fact by decreeing relatively severe penalties for these offenses. In order to allow enhancement for these reasons, the trial court should be limited to only those most extraordinary cases. See, e.g., Thomas v. State, 461 So.2d 234 (Fla.1st DCA 1984).

In sum, Petitioner urges the impossibility of answering the two fundamental questions inherent in this or any other guidelines appeal. The first question, even if answered affirmatively, is only half the loaf: Had the trial court known it could not rely upon certain objectionable factors, would it still have departed from the presumptive sentence? The second question is no less important: If so, would it have departed to the extent it did?

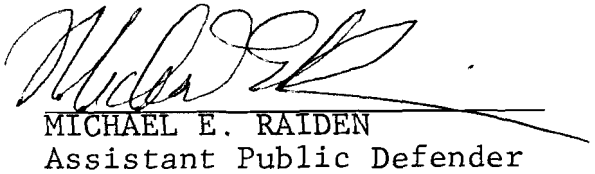
Given these manifest uncertainties, the most equitable solution is that recommended by the Fourth District Court of Appeal in Davis v. State, supra. This provides the trial court with a chance to rethink and/or clarify its position, and the defendant a chance to be heard in light of the new developments.

CONCLUSION

For the above reasons and authorities Petitioner respectfully requests this Honorable Court adopt the position taken in Davis v. State, supra. The decision of the court below should be reversed and this case remanded for resentencing. The first portion of the certified question should be answered in the negative; the second, in the affirmative.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT



MICHAEL E. RAIDEN
Assistant Public Defender

Hall of Justice Building
455 North Broadway
Bartow, Florida 33830-3798
(813) 533-1184

Counsel for Petitioner