IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

Case No. 67,224

ON APPEAL OF THE DISTRICT COURT OF APPEAL OF FLORIDA
IN AND FOR THE SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

OTHER AUTHORITIES

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). (R 9-11) Petitioner entered a plea of nolo contendere to both charges May 22, 1984, before Circuit Court Judge Oliver L. Green, Jr. (R 80)

On July 25, 1984, Petitioner was sentenced to concurrent terms of thirty years in prison, with credit for 166 days served. (R 110-112) The presumptive sentence under the guidelines was 9 to 12 years. (R 113) 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 episode upon the victim, Petitioner's lack of remorse, and the fact Petitioner had involved members of her family in the offense. (R 113-114) Further, the trial court adopted suggestions filed June 5, 1984, by the Assistant State Attorney assigned to the case (R 84), 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. (R 84, 114)

Notice of Appeal was filed August 15, 1984. (R 121) 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 merits follows:

SUMMARY OF THE ARGUMENT

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, infra, Manning v. State, infra, and Garica v. State, infra, The United States Supreme Court's decisions in Lockett v. Ohio, infra, and United States v. Grayson, infra, and the proscriptions found in Fla. R. Crim. P. 3.701, Respondent contends that for purposes of departure, the trial court may consider and rely upon any factor, 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)(11).

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, infra; Garcia v. State, infra; Higgs v. State, infra; Albritton v. State, infra. In applying this standard of review, a well established appellate principle, which has been employed in substance in recent guidelines cases decided by the district courts, Swain v. State, Mitchell v. State, infra, Webster v. State, infra, Albritton v. State, infra,

and Higgs v. State, infra, dictates that where a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reasons 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.

ARGUMENT

The answer to the certified should be:

> 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.

Rule 3.701(d)(11), Florida Rules of Criminal Procedure, indicates departures from the sentencing guidelines should be for "clear and convincing" reasons. The only limitations on these reasons are factors relating to past or present offenses where no conviction was obtained. By adopting the above answer, this Court will leave intact the inherent sentencing discretion of the trial judge.

The district courts of this State have recognized the sentencing guidelines are designed to aid the sentencing court in carrying out its functions. However the ultimate determination is still within the sound discretion of the trial judge. In Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984) the district court said:

> The purpose of the sentencing guidelines is to promote more uniformity in sentencing without usurping judicial discretion. While it was contemplated that most sentences would fall within the guidelines, it was also anticipated that from 15 to 20 per cent of the sentencing decisions routinely would fall outside the recommended range. To prevent an abuse of discretion, provision was made for appellate review of the reasons given for departing from the guidelines. Florida Rules of Criminal Procedure 3.701(d)(11).

Accord, Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984); Addison v. State, 452 So.2d 955 (Fla. 2d DCA); Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984). The rule itself. Rule 3.701(b)(6), states the guidelines are not intended to usurp judicial discretion.

Answering the question certified requires a determination of what is a clear and convincing reason and what is the standard of review applicable to sentencing guidelines cases. Respondent submits the proper standard of review should be in conformity with other matters where the trial court has discretion, whether the court abused its discretion. See Menendez v. State, 368 So.2d 1278 (Fla. 1979) (ruling on Motion to Sever should not be disturbed absent clear abuse) and Matera v. State, 218 So.2d 180 (Fla. 3d DCA 1969) (ruling on scape of cross-examination not subject to review except in cases of abuse).

Prior to enactment of the sentencing guidelines a trial judge could exercise his discretion in sentencing up to the maximum sentence provided by law for a particular crime without opportunity for appellate review. See Rummell v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) and Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The courts did consider when exercising this seeming limitless discretion not only pre-sentence reports but also the entire character of the defendant. The Supreme Court said in United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978);

> Of course, a sentencing judge is not limited to the often far-ranging material compiled in a presentence report. "(B)efore making (the sentencing) determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446, 30 L.Ed.2d 592, 92 S.Ct. 589 (1972) (Text 57 L.Ed.2d at 589)

See also Roberts v. United States, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980).

Respondent submits with the exception of the limitation imposed by the guidelines, a trial judge still can consider a defendant's character, etc. in determining what sentence to impose. In order to have an abuse of discretion in sentencing, it must be shown there was no clear and convincing reason for departing from the recommended guidelines sentence, i.e. the reason or reasons given for departure is forbidden under the rule and therefore arbitrary. However, as was previously noted, Rule 3.701 leaves reasons for departure as broad as an individual case would dictate with the lone exception being the court cannot consider past or present offenses for which there has been no conviction.

The Second District implicitly in this case and expressly in Weems v. State, supra, and Addison v. State, supra, has recognized its limited role of determining abuse within the language of the rule. The First District in Garcia v. State, 454 So.2d 714, 718 (Fla. 1st DCA 1984) opined:

> In the final analysis, we reject the notion, implicit in this and the mounting deluge of guidelines appeals, that there reposes in the language of the guidelines, either in the "clear and convincing reasons" terminology or elsewhere, a set of sentencing departure absolutes only awaiting the proper occasion for the appellate courts to reveal them on a case-by-case basis. Rather, the guidelines are for the guidance of the trial court, as on the fact thereof they are represented to be, and the appellate courts' function is simply to enforce their proper application and to review departures by the trial courts to determine if there has been an abuse of discretion warranting reversal.
>
> (emphasis added)

There is no set of absolutes. The absence of a "list" of reasons for departure is consistent with the notion that the court must be free to consider all the mitigating and aggravating circumstances surrounding a crime in order to make an appropriate sentencing decision. Compare, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

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 guidelines recommended range, it cannot be said that the trial judge, in departing, abused his discretion and the cause should therefore be affirmed. This proposition is nothing more than recognition of the well established principle that if 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. Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963). See also Martin v. State, 411 So.2d 987, 989 (Fla. 4th DCA 1982). While not specifically articulated, this principal has been employed by the lower court and other district courts to uphold departures where the trial court relied upon permissible as well as impermissible reasons for departure. See Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984); Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984), Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984), Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984) Higgs v. State, supra.

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 constitute a bona fide basis for departure in the particular case and have the unwarranted 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 resut would made a mockery of the guidelines and assign the highest priority to form rather than substance.

As Judge Nimmons opined in his dissenting opinion in

Young v. State, 455 So.2d 551, 553-554 (Fla. 1st DCA 1984):

> Even though some of the articulated reasons may not qualify as clear and convincing reasons under Rule 3.701(d)(11), at least one was. Under such circumstances, I do not understand why this court should be expected to examine all of the other reasons in order to determine whether they, too, would permit departure from the guidelines. Once the appellate court determines that an articulated clear and convincing reason existed for the trial court's imposition of a sentence outside the guidelines, further inquiry into the reasons should not be required. I believe this approach is consistent with the law and comports with logic and reason. Moreover, I believe a contrary approach will be an invitation to resourceful defense counsel to urge the kind of flyspecking review which, I believe, when the framers and proponents of sentencing guidelines never intended. Frequently, conscientious trial judges articulate numerous reason for imposition of a particular sentence, and its is healthy that they do so in order that all interested persons will know why the court did what it did. But if we adopt the appellant's approach to sentence review under the guidelines, we will be compelled to examine each and every reason mentioned by the trial court. And if, for example, only one of five reasons is found to be wanting, the case will have to be remanded for resentencing, with all of the attendant costs associated therewith including the cost of transporting the prisoner to the sentencing court from whatever state corrections institution to which he may have been assigned. Such further erosion of the goal of finality in the criminal judicial process is, in my view, uncalled for.

This approach to the question is consistent with our handling of a similar problem in the context of death cases.

Capital defendants have consistently argued they should have

a new sentencing hearing where one or more aggravating circumstance has been erroneously considered by the trial court. And this Court has constantly held the death penalty appropriate where there are good aggravating circumstances found despite the rejection of other aggravating factors. No remand for resentencing is necessary. See Zeigler v. State, 402 So.2d 365 (Fla. 1981); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Shriner v. State, 386 So.2d 525 (Fla. 1980); Antone v. State, 382 So.2d 1205 (1980); Brown v. State, 381 So.2d 890 (Fla. 1980); Ford v. State, 374 So.2d 496 (Fla. 1979), Washington v. State, 362 So.2d 658 (Fla. 1978); Aldridge v. State, 351 So.2d 945 (Fla. 1977) and Elledge v. State, 346 So.2d 998 (Fla. 1977).

CONCLUSION

Based upon the arguments advanced above and the authority cited in support thereof, the lower court correctly upheld the departures since it found that the trial court relied upon valid reasons in both cases, notwithstanding the presence of impermissible reasons. This is not to suggest that the determination of the validity of a departure should be reduced to a "numbers game". See State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), where this Court recognized that the capital sentencing procedure is not a mere counting process. The lower court could have properly affirmed even if it found only one reason advanced by the trial judge was permissibe.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Michael E. Raiden, Assistant Public Defender, Hall of Justice Building, 455 North Broadway, Bartow, Florida 33830 this 16th day of July, 1985.

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OF COUNSEL FOR RESPONDENT.