IN THE SUPREME COURT OF FLORIDA

JERRY LEE SLOAN,

Petitioner,

v. CASE NO. 67,421

STATE OF FLORIDA,

Respondent.

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

BRIEF OF THE RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

This case is before the Florida Supreme Court on Discretionary Review of the decision of the District Court of Appeal, Second Dsitrict of Florida. In this brief, the parties will be referred to by their proper names or as they stand before this Court. The letter "R" will be used to designate a reference to the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement of the case and facts as a substantially accurate account of the proceedings below, with such exceptions or additions as set forth in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

ISSUE I

It is not reversible error for the trial court to depart from the recommended sentencing guideline range where valid, clear and convincing reasons for the departure are provided, despite the court's reference to impermissible reasons. It is inappropriate to place the burden on the state to prove beyond a reasonable doubt that the departure sentence was not affected by the invalid reasons. The presence of valid reasons is sufficient to affirm the sentence. The petitioner may then seek reduction or modification of his sentence in the trial court after appeal under Florida Rule of Criminal Procedure 3.800 on the grounds that less than all of the reasons stated by the trial court for departure were held valid by the appellate court.

A departure sentence that is within the statutory maximum for the offense, and that is supported by clear and convincing reasons for departure, is not an abuse of discretion. However, even if the court remains unwilling to accept that standard, under Albritton, the sentence imposed herein did not constitute an abuse of discretion in view of the circumstnaces and reasons for departure.

ISSUE II

Testimony of the state's witness on direct examination revealing a prior inconsistent statement offered in conjunction with an explanation of the inconsistency was not an attempt to impeach the witness. Such testimony was intended to bolster the

credibility of the witness. Accordingly, it did not run afoul of the rule against a party impeaching its own witness. Furthermore, petitioner was not prejudiced by the state's trial tactics. Defense counsel on cross-examination explored the circumstances of the prior testimony in an effort to impeach the witness. The fact that evidence of the prior testimony was introduced on direct examination did not alter the totality of the testimony heard by the jury. Therefore, even if error did occur in that regard, it was at worst harmless.

ARGUMENT

ISSUE I

WHETHER A SENTENCE WHICH DEPARTS FROM THE RECOMMENDED GUIDELINE RANGE MUST BE REVERSED AND REMANDED WHEN THE TRIAL COURT PROVIDES BOTH VALID AND INVALID RASONS FOR DEPARTURE: AND WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN THE EXTENT OF THE DEPARTURE.

The state acknowledges that this issue has been decided by this Honorable Court in Albritton v. State, No. 66,169 (Fla. August 29, 1985) [10 F.L.W. 426]. However, the state contends that the law set forth in that decision should be reconsidered in light of hte following argument.

In Albritton, this Court held that when a sentence departing from the sentencing guidelines is grounded on both valid and invalid reasons that the sentence should be reversed and the case remanded for resentencing unless the state is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence. 10 F.L.W. at 426. This holding was based upon an application of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) which places the burden on the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict.

The state submits that such application was inappropriate. Chapman involved denial of a federal constitional right. By contrast, the purpose of the sentencing guidelines is to aid the trial judge in the sentencing decision and are not intended

to usurp judicial discretion. Florida Rule of Criminal Procedure 3.701(b)(6). Rule 3.701 is a procedural mechanism by which the courts are guided in the exercise of that discretion. Operation of these guidelines do not implicate constitutional rights; and the failure of a court to comply with the guidelines does not rise to the level of a constitutional deprivation that would justify the imposition of such a heavy burden upon the state as in Chapman.

Requiring the state to show that the trial court, beyond a reasonable doubt, would have departed from the guidelines even in the absence of the invalid reasons, has the effect of removing the presuption of correctness of the lower court's ruling and shifts to the state the burden of proving that the lower court's ruling should be affirmed. This is clearly contrary to all traditional precepts of appellate law and procedure. See, 3 Fla.Jur.2d, Appellate Review §313; 15 Fla.Jur.2d, Criminal Law §§976,983.

Moreover, the practical effect of shifting such a heavy burden upon the state to prove that the invalid reasons did not affect the departure sentence is to create very nearly a per se reversible error rule with respect to departure sentences based upon both valid an invalid reasons. Such a per se reversible solution was rejected by this court in Albritton.

A more practical and efficient solution exists and is fully in accordance with the Florida Rules of Criminal Procedure, and meets the concerns of this court expressed in Albritton. It is

apparent from that decision that the court is opposed to an appellate court upholding a trial judge's sentence where it is not clear that the same sentence would have been imposed had the trial judge relied soley upon the valid reason for departing from the guidelines. A mechanism already exists in the rules which permits review of the sentence following direct appeal without the need for remand of the case. Florida Rule of Criminal Procudre 3.800(b) states:

> A court may reduce or modify to include any of the provisions of Chapter 948, Florida Statutes, legal sentence imposed by it within sixty days after such imposition, or within sixty days after receipt by the court of a mandate issued by the appellate court upon affirmance of the judgment and/or sentence upon an original appeal, . . .

Florida Rule of Criminal Procedure 3.800(b)(emphasis added)

Under this rule, an appellate court could affirm the judgment and sentence of the trial court, provided it found that the departure sentence was supported by clear and convincing reasons (Florida Rule of Criminal Procedure 3.701 d. 11), notwithstanding that one or more of the reasons was invalid. Following receipt of the mandate by the trial court, the defendant would have sixty days within which to file a Motion for Reduction of Sentence in the trial court on the basis of the appellate court's determination that less than all of the reasons given for departure were valid. Such a motion would permit the trial court the opportunity to re-evaluate whether departure was still warranted and if so, whether the extent of the departure should be modified, in view of the appellate court's decision.

Such a procedure would eliminate any need for the appellate courts to weigh evidence in determining beyond a reasonable doubt what the trial court would have done. In other words, if there are valid reasons to support departure, then departure is permissible under Rule 3.701 d. 11. and the trial judge has not committed reversible error. Thus affirmance of the sentence is appropriate. However, the question remaining is whether the trial judge in his discretion would have departed had he known that some of the reasons he gave for departure were invalid. This appears to be the point of concern by the court in Albritton. Use of Rule 3.800 permits the trial court itself to make that determination. The appellate court need not guess. However, it might be appropriate to require the appellate court to recite in its opinion that, on the basis of its determination that invalid reasons were cited for departure, appellant may seek reduction or modification of the sentence by motion in the trial court within the appropariate time period.

This solution meets with the goal of Albritton without creating the problems associated with application of the reasonable doubt standard. In addition, this solution prevents sandbagging and piecemeal litigation, and is judicially more efficient. The District Courts have held that sentencing errors may be reviewed on appeal, even in the absence of a contemporaneous objection, if the errors are apparent and determinable from the record on appeal. See, Bradley v. State, No. 84-2311, 84-2346, 84-2348 (Fla. 2 DCA September 13, 1985)[10 F.L.W.

2137]; Dailey v. State, 471 So.2d 1349 (Fla. 1 DCA 1985). Therefore, under the law expressed in Albritton, the defendant has no incentive to object to errors in the departure sentence since it will almost certainly be reversed on appeal. However, if the presence of both valid and invalid reasons for departure would mean the sentence would be affirmed, a defendant would be more inclined to bring the error the the court's attention at sentencing, thereby permitting the court to correct any errors at the earliest possible stage of the proceedings.

The above procedure would also be consistent with the abuse of discretion standard adopted by this court for review of the extent of departure. See, Albritton, supra. However the state takes exception to the court's application of that standard. In Albritton, the court expressly disapproved the District Court's holding that the only lawful limitation on a departure sentence is the maximum statutory sentence for the offense. Under the abuse of discretion standard set forth in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), however, that must indeed be the only limitation. In Canakaris, the court stated:

> . . . discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.
>
> 382 So.2d at 1203.

Under sections 810.02, 812.014, 775.082, the statutory maximum sentence of the third degree felonies of burglary and theft is five years incarceration. The inescapable implication of these statutory provisions is that the Florida State Legislature

determined that the commission of the acts proscribed in those sections, with nothing more, could warrant the lawful imposition of a sentence up to that statutory maximum. To hold that a sentence that is within the statutory maximum constitutes an abuse of judicial discretion is to conclude that the statutory maximum provided by law, as permissible punishment for the commission of the acts proscribed in the crimnal statute, is unreasonable, and that the members of the Florida Legislature who passed that law are not reasonable persons. While there are undoubtedly some who would debate the later point, it is not realistic for this court to so hold.

Even if this court remains unwilling to accept the statutory maximum sentence as the only limit upon the exercise of judicial discretion in departing from the guidelines where valid clear and convincing reasons are provided, the state contends that under the cirucmstances of the instant cese, there was no abuse of discretion in the extent of departure. It cannot be said that reasonable men could not differ with respect to whether the five year sentence imposed for burglary and theft in this case was appropriate. Valid reasons stated by the trial court for departure included petitioner's conviction of a trespass upon a structure prior to sentencing in this case, which under Rule 3.701(d)(5) could not be factored into the scoresheet as a "prior record." (R 127 - 128) Also, a reason for departure was the fact that petitioner was part of an organized group engaged in a similar pattern of crimnal behavior. (R 127

- 128) See, Sloan v. State, 472 So.2d 488, 490 (Fla. 2 DCA 1985). Based upon these reasons the trial court concluded that a more severe sentence was necessary to accomplish the purposes of Rule 3.701(b)(2 - 4). (R 127 - 128) Reasonable men could differ, based upon the above facts and circumstances, as to whether a departure sentence of five years is appropriate. Accordingly it cannot be said that the trial court abused its discretion in so sentencing petitioner.

Therefore this court should hold that (1) the trial court did not err in departing from the sentencing guidelines presumptive range where it stated clear and convincing reasons for doing so, despite the trial court's reference to two invalid reasons; (2) the extent of the trial court's departure was not a abuse of discretion; and (3) petitioner may seek reduction of his sentence by motion in the trial court under Florida Rule of Criminal Procedure 3.800 based upon the appellate court finding that less than all of the reasons given for departure were valid.

ISSUE II

WHETHER THE TESTIMONY OF A WITNESS ON DIRECT EXAMINATION REVEALING A PRIOR INCONSISTENT STATEMENT OF THAT WITNESS, OFFERED IN CONJUNCTION WITH AN EXPLANATION OF THE INCONSISTENCY IN AN EFFORT TO ESTABLISH THE CREDIBILITY OF THE WITNESS, CONSTITUTES IMPEACHMENT OF THE EXAMINING PARTY'S OWN WITNESS.

Historically, attacks on the credibility of a witness have been permitted only by a party against whom the testimony is offered, and it has been improper for the party calling a witness to impeach the credibility of that witness. Poitier v. State, 303 So.2d 409 (Fla. 3 DCA 974); Johnson v. State, 178 So.2d 724 (Fla. 2DCA 1975); Ehrhardt, Florida Evidence §608.2 (2d Ed. 1984). The rule is based on the belief that the party who calls a witness to testify vouches to the court for the credibility of that witness. Ehrhardt, Florida Evidence §608.2 (2d Ed. 1984). The "voucher rule" has been retained in the Florida Evidence Code in §90.608(1).[1]

The issue sub judice is whether the testimony of a witness revealing a prior inconsistent statement of that witness, offered in conjunction with an explanation of the inconsistency in an

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[1]Widespread cirticism of the common law voucher rule has led to its demise in the federal court system and many other jurisdictions, on the premise that a party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. See, Fed. R. Evid. 607, Notes of Advisory Committee on Proposed Rules. Drafters of the Code in Florida considered repealing the rule, but declined to do so reasonsing that generally counsel should not call a witness whom he knew was not testifying truthfully and proceeded to impeach that person. See Ehrhardt, Florida Evidence §608.2 (2d Ed. 1984).

effort to demonstrate credibility, constitutes impeachment of one's own witness. The state strongly urges that this form of trial strategy, generally referred to as "anticipatory rehabilitation," does not constitute impeachment of one's own witness, and therefore is not offensive to §90.608, Florida Statutes.

In Bell v. State, 473 So.2d 734 (Fla. 2 DCA 1985) during the direct examination of the state's witness the prosecutor elicited, over defense objection, that the witness had initially lied about the defendant's participation in the crime because he was attempting to protect the defendant out of friendship. On appeal, the defendant asserted that the interrogation relating to the prior inconsistent statement constituted impeachment of the state's own witness in violation of §90.608, Florida Statutes. The court rejected that argument reasoning:

> Had the challenged interrogation of McBride been intended to attack his credibility, it would have been improper in the absence of McBride's manifesting testimonial hostility during his appearance as a witness on behalf of the state. We do not, however, perceive the prosecutor's questions and McBride's explanation of the reasons for his earlier inconsistent statements to be impeachement. Indeed, it is evident the state was seeking to enhance or shore up McBride's credibility by candidly disclosing that at an earlier time he had fabricated the story that Bell was not involved in the crime.

473 So.2d at 735.

In Ryan v. State, 457 So.2d 1084 (Fla. 4 DCA 1984), in dictum condemning "anticipatory rehabilitaton," the Fourth District reasoned that such tactics "rob" the defense attorney of

his ability to impeach through prior inconsistent statements and scramble the procedure set forth by the Rules of Evidence. The Bell court, rejecting the view of the Fourth District concluded that the testimony did not rob the defense attorney of the ability to pursue the inconsistencies in an attmempt to undercut the quality of the witness' testimony. Bell, 473 So.2d at 735 - 736.

The above cited decision in Bell and the Second District's decision in this case were rendered on June 7, 1985 just shortly after, and without the benefit of, the Fifth District's decision in Price v. State, 469 So.2d 210 (Fla. 5 DCA 1985). Price squarely confronted the same issue and rendered a contrary result. The court in Price expressed concern that "anticipatory rehabilitation" has the effect of interfering with the opposing party's trial strategy.

On rehearing, in Bell v. State, Case No. 84-1616 (Fla. 2 DCA July 19, 1985) [10 F.L.W. 1765], the Second District considered §90.608(1) in the context of its purpose:

> But, unlike our sister court, we do not find the purpose underlying the rule to be the protection of an opposing party's trial tactics or to shield against the speculative implications deemed significant in Price. Rather, the rule codified in section 90.608 has evolved from the ancient but often criticized principle that when a party calls a witness that party vouches for the witness's credibility. i.e. the "voucher rule." See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 297 (1973). Thus, in the circumstance where, as the record discloses here, the objective in revealing and

> attempting to explain away the prior inconsistent statement is to bolster the witness's credibility, we do not view the technique as proscribed impeachment. See Ehrhardt, Florida Evidence §608.2 (2d Ed. 1984).

Bell, 10 F.L.W. at 1765.

Thus, anticipatory rehabilitation, occurring in the context of a prior inconsistent statement, intended to buttress, not discredit, a witness' credibility is not impeachment and does no violence to §90.608(1)(a) Florida Statutes. Indeed, the Fifth District's interpretation of §90.608 is at odds with its own decision in Sneed v. State, 397 So.2d 931 (Fla. 5 DCA 1981). Price condemns the state's "anticipatory rehabilitation." Sneed condones a defendant's election to first bring out his prior conviction in an effort to soften its effect. Sneed, 397 So.2d at 933.

In the instant case, the state elicited testiony from its own wintess Michael Grant regarding his plea agreement and his agreement to testify fully and truthfully against petitioner and his initial testimony which was exculpatory of petitioner. (R 138 - 141) Grant also testified as to why his prior testimony was inconsistent with that he gave at trial. (R 141) It is clear from the record that the state was not attempting to discredit the trial testimony of Grant. Indeed, quite the contrary. The state, as it did in Bell was attempting to establish the witness' credibility by showing that although he had previously lied he was now telling the truth. The evidence of the

plea agreement and other circumstances of the prior testimony was relevant to Grant's motive, bias, and veracity. It is inconceivable that the record sub judice could be read to suggest that the state was attempting to show that Grant was not telling the truth at trial. Accordingly, the interrogation to which petitioner objects does not constitute impeachment of the state's own witnesss and exclusion of the evidence would not serve the purpose for which Rule 90.608(1) was retained. See note 1., supra. This reasoning is consistent with the Second District's decision on rehearing in Bell, supra, and as discussed therein is completely in accord with the purpose behind §90.608(1).

Furthermore, the weight of authority in analagous cases supports the position urged by the state. See, Jacobson v. State, 375 So2.d 1133 (Fla. 3 DCA 1979) (The prosecutor was justified in anticipating an attack upon the credibility of his witnesses by eliciting the details of their criminal past and their motives for cooperating with the state and federal authorities); United States v. Medical Therapy Services, Inc., 583 F.2d 36, 39 - 40 (2d Cir. 1978), cert. denied, 439 U.S. 1130, 99 S.Ct. 1049, 59 L.Ed.2d 91 (1979)(when government brings out prior convictions on direct, it is not attacking the credibility of the witneess); United States v. Hedman, 630 F.2d 1184, 1198 (7th Cir. 1980), cert. denied. 450 U.S. 965, 101 S.Ct. 1481, 67 L.ed.2d 614 (1981)(government brought out on direct that witness had been granted immunity).

Incidently it is important to note that the witness'

testimony on direct examination bostering his credibility does not run afoul of the rule that party may support the credibility of a wintess only after the character of a witness has been attacked by reputation evidence. That limitation, contained in §90.609 Florida Statutes pertains only to supporting the credibility of a witness by evidence of reputation for truthfulness. The enormous needless consumption of the time which a contrary practice would entail justifies this limitation. However, the rule does not so limit the bolstering of a witness' credibility by his own tesimony, as in the instant case, regarding the facts and circumstances of the case. Indeed to hold otherwise would prohibit any party from eliciting from its witnesses on direct examination, testimony pertaining to facts and circumstances of the case which bear on perception, motive, bias, etc., which by nature affect the credibility of the witness', testimony either directly or by corroboration through consistency with the testimony of other witnesses.

Finally, even if this Hnorable Court is unwilling to adopt a per se rule that "anticipatory rehabilitation" does not constitute impeachment of one's own witness in violation of §90.608, Florida Statutes, the state contends that at least in the instant case, there has been no prejudice to petitioner as a result of the prosecutor's choice of trial tactics which would require reversal of the conviction herein. In Bell, 473 So.2d 734, the court found:

> On balance, the rehabilitative inquiry undertaken during McBride's direct examination, rather than upon redirect questioning, did not alter the totality of the testimony heard by the jury nor did it impair the jury's task of determining the truth. Indeed, our review of McBriede's cross examination reveals comprehensive exploration into the circumstances leading up to and terminating in McBride's initial sworn statement. We find no prejudice to the appellant following from the anticipatory rehabiitation of McBride.

473 So.2d at 736.

Similarly in the instant case, defense counsel on cross examination of Grant explored in detail the cirumstances of the prior testimony and the plea agreement in an effort to show tht Grant's testimony at trial implicating Petitioner was perjured and that such perjury was motivated by Grant's plea agreement. (R 143 - 151) As in Bell, the fact that the inconsistencies in the prior testimony and the testimony at trial were revealed on direct examination rather than upon cross, did not alter the totality of the testimony heard by the jury. The principle that the jury is entilted to information regrding bias or self-interest is equally valid whether such information is brought out on direct or cross-examination. Jacobson, 375 So.2d at 1135, n. 2. Petitioner has not shown that the prosecutor's questioning of Grant injuriously affected his substantial rights. See, §924.33, Florida Statutes, 15 Fla. Jur. 2d, Criminal Law §§984, 985. Moreover, on the record sub judice, no prejudice can be shown that would warrant reversal of the conviction. For the reasons discussed, above, and in view of the

overwhelming evidence of guilt contained in the record, any error on the part of the trial court with respect to the admissibility during direct examination of Grant's testimony regarding his plea agreement and previous testimony is at worst harmless. See Generally, 15 Fla. Jur. 2d, Criminal Law §984; State v. Windsworth, 210 So.2d 4 (Fla. 1968); Manning v. State, 336 So.2d 408 (Fal. 3 DCA 1976).

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, respondent asks this Honorable Court to affirm petitioner's judgment and sentence; and to affirm the decision of the Second District Court of Appeal.

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 D. P. Chanco, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, P. O. Box 1640, Bartow, Floirda 33830-3798, this 24th day of January, 1986.

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