IN THE SUPREME COURT OF FLORIDA

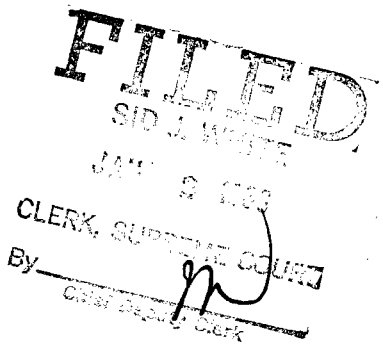
JERRY LEE SLOAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



Case No. 67,421

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

BRIEF OF THE PETITIONER ON MERITS

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STATEMENT OF THE CASE

Petitioner was charged with burglary of a structure and grand theft, by information filed in Collier County Circuit Court. (R3) Trial was held July 3, 1984, before the Honorable Charles Carlton, Circuit Judge. A guilty verdict as to both counts was returned. (R99-100)

Petitioner was adjudicated guilty, and sentenced to five years imprisonment for each count; to run concurrently, with time-served credit. (R119-120)

The case was appealed to the Florida Second District Court of Appeal, which affirmed the trial court in an opinion issued June 7, 1985. Sloan v. State, Case No. 84-1718 (Fla. 2d DCA June 7, 1985). A motion for rehearing was denied on July 10, 1985.

A notice of intent to seek discretionary review for the Florida Supreme Court was filed July 22, 1985, followed by a brief on jurisdiction.

STATEMENT OF THE FACTS

Michael Grant testified for the State. He stated he knows Nicky Chandler and Jerry Sloan. (R131) On November 13, 1983, he was at Denise Perry's apartment with Nicky Chandler and Jerry Lee Sloan. (R132) At one point he testified they went to Norman Jewelers. (R133) He said he gave a crowbar to Sloan who used to pry open the door of the jewelry store. (R135) Once inside the store, they took chains and watches. (R136) He testified the chains were hanging in State Exhibit 4. (R137)

When they returned to Denise's, they divided the jewelry among the three of them. (R138) Grant testified he negotiated a plea with the State and, as a condition, agreed to testify against Appellant. (R139) Objection was made by the defense as to impeaching one's own witness. Grant said he had also testified on May 3, 1984. (R141)

Arthur Norman testified for the State. He is co-owner of Norman Jewelers in Naples, Florida (81), and was owner on November 13, 1983. (R82) On that date he was notified of a burglary at his store. He went to the store, found things scattered around some items missing. (R83) Merchandise, which cost him around $11,000 was missing. (R83)

Mr. Norman identified State's Exhibits 1,2, and 3, as items taken from his jewelry store. (R85) He identified State Exhibit 4. (R85)

Debra Perry testified as a State's witness. Michael Grant used to be her boyfriend. He, along with Sloan, were at her apartment November 13, 1983. (R109) Other people were also present on that date. Sloan and Grant talked about robbing a store. They departed and when they returned, they had the jewelry with them. (R112)

She also said Michael Grant gave some watches and a necklace to her. (R113) She identified State Exhibits 1,2, and 3 as items given her by by Grant. (R114) Later he beat her up and she went to the police. (R114)

Steven Moore testified for the State. He is a patrolman for the Naples Police Department. (R124) He received a dispatch to Norman Jewelers November 13, 1983. (R124) He collected some items of evidence, including State's Exhibit 4 and turned them over to Crime Technicial Conley. (R127)

Ronald Mosher, a police officer who came into contact with Appellant on December 3, 1983, testified. (R129) He read Appellant his Miranda rights, and Appellant stated he knew Michael Grant by sight and Nicky Chandler by name. (R132) He took Appellant's fingerprints and identified them as Exhibit

11. (R134) They were admitted into evidence without objection. (R135)

Lamar Conley also testified for the State. He was accepted as an expert witness for fingerprint analysis and comparison. (R140) He went to Norman Jewelers on November 13, 1984 (140), and photographed the scene and lifted some latent fingerprints. He identified State Exhibits 12 - 15. (R141) He developed fingerprints from State Exhibits 4 and 5 (R144), and compared Appellant prints with latent prints from State Exhibits 16 - 19. (R149) In his opinion those prints were Jerry Lee Sloan's. (R150) Exhibits 11, and 16 - 19 were admitted into evidence without objection. (R151)

Exhibits 1,2,3,4 and 5 were admitted over objection. (R165) A motion for judgment of acquittal was made and denied by the court.

Jerry Lee Sloan testified on his own behalf. (R167) He has been in several jewelry stores in Naples. (R168) He has browsed in jewelry stores in Naples. (R169) He said he did not break into Norman Jewelers.

The sentencing guidelines scoresheet is in the record at R124. Written reasons for exceeding the guidelines were set out by the trial judge at Record 127-128.

SUMMARY OF ARGUMENT

ISSUE I.

It is Petitioner's position, that when any one of the reasons for exceeding a Guidelines Sentence is found to be unacceptable, the case should be remanded to the trial court for resentencing. The reason found unacceptable may have had an influence upon the extent of the departure from the sentence as calculated pursuant to the Sentencing Guidelines.

ISSUE II.

There was error commited by the trial court in allowing the state to impeach one of its own witnesses, by posing questions in regard to prior convictions, and negotiated "deals" in regard to sentence. The court's action in permitting the state to proceed in such fashion, scrambled the orderly procedure of courtroom behavior, robbed the defense of an important tactic, and deprived the accused of his right to a trial conducted in a proper manner.

ARGUMENT

ISSUE I.

WHEN IT IS DETERMINED THAT THE TRIAL JUDGE RELIED UPON SOME IMPERMISSIBLE CRITERIA AS A BASIS TO EXCEED THE SENTENCING GUIDELINES, THE CASE MUST BE REMANDED FOR RESENTENCING.

When the presumptive sentence, as calculated by the Sentencing Guidelines, is exceeded, and some of the reasons for departure are impermissible, what action should the appellate court take? Petitioner would submit that if any of the reasons given for departure are found to be improper, the cause should be remanded for resentencing, since the unacceptable reason(s) for the departure may have affected the extent of the departure.[1/]

The sentencing guidelines were established to provide uniformity in regard to standards to guide the sentencing judge, and to establish consistency in sentencing among the various circuits. To achieve the desired consistency, departures from the Guidelines are to be avoided unless clear and convincing reasons exist to exceed or mitigate the sentence.

1/ Petitioner's position is that the sentence imposed upon him was improper, and questions any of the reasons for exceeding the presumptive sentence as "acceptable."

Fla.R.Crim.P. 3.701; Lindsey v. State, 453 So.2d 485 (Fla. 2d DCA 1984).

In regard to the imposed sentence, the question is twofold: was a deviation proper, and was the extent of departure proper?

In the district court, it was argued that no proper reasons existed to exceed the guidelines presumptive sentence. The appellate court found two reasons "adequate," and two "impermissible." The reasons deemed adequate; conviction of trespass to a structure, and "circumstances (which) evidence that the defendant, along with his co-perpetrators formed an organized group for the purpose of burglarizing businesses (slip opinion p.4). Petitioner would submit that even if the trial court were correct, that conviction for trespass of a structure did occur, such does not constitute proof of existence of a burglary ring.[2/] Lack of such proof would seem to cast a shadow of doubt upon such reason as valid. See: Wyman v. State, 459 So.2d 1118 (Fla.1st DCA 1984). Thus, it would seem that at least one, if not both, of the "approved" reasons is upon thin ice.

The question of extent of departure remains a

2/ There is no evidence in the record that Petitioner was ever charged with "conspiracy," or any other similar crime.

question with, or without, any change in regard to the validity of the reasons to depart. In Young v. State, 455 So.2d 551 (Fla.1st DCA 1984), it was ruled, "impossible to determine whether the trial judge would have come to the same conclusion," solely on the basis of the reasons found valid. at 552. In Davis v. State, 458 So.2d 42 (Fla.4th DCA 1984), it was ruled that impermissible reasons for departure from the guidelines could affect the extent of departure, and that it is more equitable to reverse and remand for resentencing.

In Albritton v. State, ___ So.2d ___, (Fla.1985), Case No. 66,169, opinion issued August 29, 1985, it was ruled that a sentence is to be reversed and remanded, unless it can be shown that the absence of invalid reasons would not have influenced the extent of departure.

It is clear that the course of action taken in Davis and Albritton, is the path most in concert with our basis for American law. A remand would be an opportunity for the trial court to review the sentencing, and the accused might have opportunity to state his position following the appellate decision.

Petitioner submits that this case requires remand to the trial court fo resentencing. This Honorable Court should so rule.

ISSUE II.

ALLOWING IMPROPER TESTIMONY TO BE ADMITTED INTO EVIDENCE WAS ERROR.

In, Ryan v. State, 457 So.2d 1084 (Fla.4th DCA 1984), the Fourth District Court of Appeal deemed it error when the State questioned one of its own witness in such manner that it amounted to impeachment.

> The opinion in Ryan included: While it may not have been the prosecutor's specific intention to attack Deroscher's credibility, the prosecutor's questions had the effect of impeaching Deroscher in one breath by showing the inconsistent statement, and in the next breath, rehabilitating Deroscher by allowing him to explain the reason he lied. Not only does this scramble the orderly procedure laid out by the Florida Rules of Evidence, but it robs the defense counsel of an important strategic tool used in cross-examination that of impeachment of a witness through the use of prior inconsistent statements.
> at 1092.

In Price v. State, 469 So.2d 2 (Fla.5th DCA 1985), the Fifth District Court of Appeal ruled it improper for the State to impeach its own witness during its case in chief.

Section 90.608 Fla.Stat., states that a witness may be impeached, by any party except the party who calls the witness.

In a recent case, Bell v. State, ___ So.2d ___ (Fla.2d DCA, Case No. 84-1616), opinion filed July 19, 1985, the Second District acknowledged that its opinion was in

conflict with the fifth, in ruling that the process of bringing out the existence of prior inconsistent statements was anticpatory rehabilitation, and not improper as impeachment.

In the instant case, no error was detected by the appellate court. The transcript of the testimony presented shows that the prosecution was questioning one of its witnesses, and in such a manner that it constituted impeachment:

> (by the prosecution)
>
> Q. Approximately a month later you were charged and arrested for that burglary, correct?
>
> A. Right.
>
> Q. And you subsequently pled to the charges of burglary and grand theft?
>
> A. Yes.
>
> Q. You admit doing it in Court, correct? Doing the burglary and grand theft?
>
> A. Yes.
>
> Q. Before you pled on those charges did you have an agreement with the State as to what sentence you would receive?
>
> A. Yes.
>
> Q. Do you recall what that sentence was?
>
> A. Uh-huh.
>
> Q. Would you tell the jury, please?

A. Six months time served, five years probation.

Q. By the time you entered the plea, you had already served six months?

A. Yes.

(R138-139)

The state also asked this same witness questions of a similar nature at. R140

The tactic employed by the prosecution in this case amounted to an unfair sneak attack against the defense. It deprived defense counsel of any effective means of cross-examination the state's witness to show the reasons behind his testimony.

This Honorable Court should address this question, and Petitioner submits that the prosecution's tactics should be ruled improper.

CONCLUSION

For the before - mentioned reasons and authorities, Petitioner respectfully requests this Honorable Court to reverse the decision of the court below. As to the second issue, Petitioner requests that this case be reversed and remanded with direction that a new trial be held.

Should no error be found as to the second issue, Petitioner requests that, pursuant to Issue I, this case be reversed and remanded for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 31st day of December, 1985.

D. P. CHANCO