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 JURISDICTION

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STATEMENT OF THE CASE AND FACTS

In reference to this section of the brief, Respondent herein adopts and incorporates the statement of the case and of the facts as set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

The Second District Court of Appeal in the instant case ruled that the State could, on direct examination in its case in chief, properly elicit from its own witness a prior inconsistent statement and an explanation thereof in order to bolster the credibility of the witness before it is attacked by defense counsel on cross-examination. This decision is in direct conflict with the decision of the Fifth District Court of Appeal in Price v. State, No. 84-483 (Fla. 5th DCA May 23, 1985)[10 F.L.W. 1292], holding to the contrary.

The Second District Court of Appeal also ruled in the instant case that of the four reasons stated by the trial court for departing from the sentencing guidelines, the two valid reasons stated were adequate to affirm the sentence imposed upon petitioner. This ruling is not in direct and express conflict with decisions of the First and Fourth District Courts of Appeal in which those courts, due to the proliferation of invalid reasons, were unable to determine that the trial court's sentence would have been the same if based only upon the valid reasons for departure. The cases reaching a different result are thus distinguishable on the facts and no conflict exists with respect to this issue.

The State therefore asserts that this Honorable Court should grant review of this case for the purpose of resolving conflict on the sole issue with regard to which conflict exists.

ARGUMENT

ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL THEREBY VESTING THIS HONORABLE COURT WITH DISCRETIONARY JURISDICTION.

Petitioner asserts that the opinion of the Second District Court of Appeal in the instant case is in conflict with decisions of the other District Courts of Appeal on two issues.

The State acknowledges that the Second District Court of Appeal on motion for rehearing in Bell v. State, No. 84-1616 (Fla. 2d DCA, July 19, 1985) certified to this Honorable Court that its decision was in direct conflict with the decision of the Fifth District in Price v. State, No. 84-483 (Fla. 5th DCA, May 23, 1985)[10 F.L.W. 1292]. The court's decision in the instant case was based on its ruling in Bell v. State, No. 84-1616 (Fla. 2d DCA, June 7, 1985)[10 F.L.W. 1396] and was rendered on June 7, 1985 prior to the rehearing in Bell and without the benefit of the Price decision before it.

In Bell and in the instant case the Second District Court of Appeal held that the State could properly attempt to bolster the credibility of its witness by having the witness on direct examination testify to his prior inconsistent statements and then explain the inconsistencies before defense counsel could attack his credibility on cross-examination. Bell, 10 F.L.W. at 1397; Sloan v. State, No. 84-1718 (Fla. 2d DCA, June 7, 1985)[10 F.L.W. 1402, 1402]. The Fifth District

in Price rejected the States position and held that the State, in its case in chief, could not properly elicit from its own witness a prior inconsistent statement and then rehabilitate the witness by having him explain the inconsistency. 10 F.L.W. at 1292.

In view of the conflict that has arisen between the Second and Fifth Districts on this issue of "anticipatory rehabilitation", the State joins Petitioner in respectfully requesting review of this matter by this Honorable Court pursuant to its jurisdiction under Art. V, §3(b)(1), of the Florida Constitution.

The State however, respectfully requests also that this Court limit its review to the above issue with regard to which a conflict exists. Petitioner also seeks review on the ground that conflict exists between the District Courts on the issue of whether the appellate courts must reverse and remand for resentencing cases in which the trial court cites both valid and invalid reasons for departing from the sentencing guidelines.

The decision of the Second District Court of Appeal in the instant case is not in conflict on this issue with the decisions of its sister courts in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984) and Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984).

In Young the First District Court of Appeal found that of the trial judges three written reasons for departure (plus two others stated orally during sentencing), "all but one were

either impermissibly considered or not clear and convincing, or both." 455 So.2d at 552. The court found support in the record for the remaining reason but concluded:

> [W]hen this reason is mired in the confusion revealed by this record, it is impossible to determine whether the trial judge would have come to the same conclusion on this reason alone. Id.

Because of the court's inability to determine whether the trial judge would have imposed the same sentence based only upon the permissible stated ground for departure, the case was reversed and remanded to the trial court for resentencing. Id. The Court also certified to this Honorable Court the following question:

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CR.P. 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 DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING.
>
> 455 So.2d at 552.

Although the opinion in Young does not expressly purport to adopt a per se rule of reversal in every case in which both permissible and impermissible reasons for departure are stated by the trial court, the substance of the question certified gives rise to that implication. Recognizing the possibility that its decision in Young might be misconstrued, as it apparently has been by Petitioner in the instant case, the First District Court of Appeal clarified its position in

Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984). The court, again faced with an inability to determine whether under the circumstances elimination of the impermissible grounds for departure would have no effect on the trial court's sentencing decision, found it necessary to reverse the trial court and remand the case for resentencing. 458 So.2d at 17. However, the court further stated:

> Because of the similarities between this case and Young, we address one additional issue. Judge Nimmons, in his dissenting opinion in Young, in disagreeing with the result reached in that case, has articulated many of the reasons for declining to adopt a per se rule requiring reversal of sentences departing from the guidelines if one or more impermissible reasons are commingled with permissible ones. We will refrain from repetition of those reasons. We observe, however, that we agree with the views expressed by Judge Nimmons for the most part, and would recede from Young to the extent that it appears to adopt, at least by implication, a per se rule of reversal in every instance in which permissible and impermissible reasons for departure are stated by the trial judge.
>
> We think a more appropriate rule—— one which would allow greater flexibility to the trial court, but still perserve the substantial rights of the accused to have meaningful appellate review of a sentence outside the guidelines——would be to affirm the trial court's sentencing departure where impermissible as well as permissible reasons for departure are stated, where the reviewing court finds that the trial court's decision to depart from the guidelines, or the severity of the sentence imposed outside the guidelines, would not have been affected by elimination of the impermissible reasons or factors stated. (footnote omitted)
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> 458 So.2d at 17.

The court again certified to the Florida Supreme Court as a matter of great public importance the same question certified in Young.

Even more recently in Scurry v. State, No. AW-442 (Fla. 1st DCA, June 27, 1985)[10 F.L.W. 1614], the First District Court of Appeal examined 13 reasons listed by the trial court for sentencing the defendant to 30 years imprisonment, well in excess of the recommended 12-17 years. The court concluded that since the majority of reasons given for departure were valid, clear and convincing, the trial court's reliance on impermissible reasons constitutes harmless error. Again the same question as in Young and Carney was certified to this court.

It is clear that the position of the First District Court of Appeal does not advocate per se reversal of cases in which both permissible and impermissible reasons for departure are stated by the trial judge.

The position of the Fourth District Court of Appeal in Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984) is in accord with the reasoning in Carney. The Davis court states:

> [W]e agree with Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984), that if there are some acceptable clear and convincing reasons for aggravation, unacceptable ones are surplusage. Nonetheless, we must speculate that the profusion of unacceptable reasons in this case may have affected the extent of the departure. (Some emphasis added)
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> 458 So.2d at 45.

Accordingly the court reversed and remanded the case for resentencing.

These cases are not in conflict with the decision of the Second District Court of Appeal in the instant case. Here the Second District examined the four reasons stated by the trial court for departure from the sentencing guidelines, and concluded that the two permissible reasons stated were adequate to affirm the sentence imposed upon the appellant. 10 F.L.W. at 1402.

As authority for its position the court cites Williard v. State, 462 So.2d 102 (Fla. 2d DCA 1985). In Williard the court's analysis was the same as that adopted by the First and Fourth District Courts of Appeal in Carney and Davis respectively. Indeed the Second District relied upon Davis in its opinion:

> this [impermissible] factor appears to have been only one of several other clear and convincing reasons for exceeding the guidelines. A departure from the guidelines should not be reversed simply because one of the reasons for the departure was invalid if other valid reasons exist. See Davis v. State, ...and Higgs v. State, (citations omitted).

462 So.2d at 104. Accord, Brinson v. State, 463 So.2d 564 (Fla. 2d DCA 1985)(question certified).

It is clear from a careful reading of the cases cited herein that the approach taken and the law applied by the Second District Court of Appeal in the instant case is entirely consistent with that of the First District Court of Appeal in Young as later clarified by Carney and that of the Fourth District Court of Appeal in Davis, despite con-

flicting results. As discussed above, the results reached in Young, Carney and Davis were based on the appellate courts' inability in each of those cases to determine whether the trial judge would have come to the same conclusion based upon the one or two permissible reasons stated for departure where the majority of reasons stated were either impermissible or not clear and convincing. The Second District in Sloan was able to reach a different conclusion under the same analysis where it was able to determine the adequacy of the permissible reasons stated to support the sentence imposed. Accordingly there is not conflict between these cases.

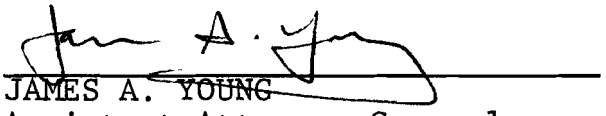
The State therefore respectfully requests that review be limited to the sole issue with regard to which conflict exists, to wit: whether the state may attempt to bolster the credibility of its own witnesses by eliciting from the witness on direct examination testimony of prior inconsistent statements along with an explanation therefor.

CONCLUSION

Based on the foregoing argument and citations of authority, the Respondent respectfully requests that this Honorable Court grant review of this case for the purpose of resolving conflict on the sole issue discussed herein with regard to which conflict has been shown to exist.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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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. Mail to D. P. Chanco, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830 on this 13th day of August, 1985.

OF COUNSEL FOR RESPONDENT