IN THE SUPREME COURT OF FLORIDA

JOHNNY LEE KEYS, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,504

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

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AUTHORITIES CITED

SUMMARY OF ARGUMENT

POINT I

The sentencing court's order supporting departure from the recommended guidelines sentence can be distilled into two valid reasons for departure neither of which is already factored into the guidelines tabulation so as to prevent their consideration. The sentencing judge's finding that the appellant's criminal history demonstrated an escalating pattern of more violent criminal conduct undeterred by prior punative efforts so as to pose a great threat to public safety is not a factor included within the guidelines scoresheet and does not run afoul of this court's holding in Hendrix. The lower court's second reason for departure is likewise valid as conceded by the petitioner in that it is based on a finding of severe psychiatric injury to the victim resulting from Keys' violent sexual battery, a factor also not included within the guidelines matrix.

POINT II

Keys has failed to carry his burden of demonstrating that the departure sentence imposed was excessive. Clearly the sentencing court felt it necessary to protect society for the greatest period possible and therefore imposed a term of year sentence commensurate with a life penalty. To attain that goal only a four cell departure was necessary and given the severity of the petitioner's crime and his well demonstrated pattern of escalating violent criminal activity it cannot be

said that no reasonable judge could impose such a sentence such that no abuse of discretion has been demonstrated.

POINT I

THE SENTENCING COURT'S REASONS FOR DEPARTURE ARE NOT IMPROPER.

ARGUMENT

The petitioner argues that in departing from the recommended guidelines sentence the trial court gave five written reasons for departure four of which were improper. Respondent respectfully submits that Keys has mischaracterized the sentencing court's written reasons for departure and that in fact the sentencing order when considered in its proper context contains only two true reasons for departure neither of which is improper; indeed, the petitioner concedes the propriety of at least one of those reasons.

As previously noted, a review of the sentencing order and crystallization of the import of its five paragraphs (R 36-37)[1] reveals only <u>two</u> actual reasons for departure neither of which run afoul of the specific proscriptions of the sentencing guidelines. First, after analysis of the specific offenses in Keys' criminal record, both chronologically and in terms of their severity and danger to the public (i.e., violent versus nonviolent behavior) and the lack of apparent deterrent effect of previous probationary and punitive efforts resulting from those offenses, the court determined that the timing and nature of those offenses demonstrated an ever escalating pattern of violent criminal activity undeterred by previous punitive efforts - a factor clearly not included as

[1](R) refers to the record on appeal.

as an aspect of the guidelines scoresheet or encompassed by the simple tabulation of prior offenses therein. The second reason - conceded to be proper by the petitioner - is the severe nature of the injury perpetrated on the victim who as noted by the sentencing court suffered "injury far in excess of . . . physical injury . . ." which required both medical and psychiatric attention (R 37, 64).

Keys' simplistic analysis of the sentencing decision of the lower court does that tribunal a great disservice. While the trial court propounded its reasons for departure in a five paragraph order Keys' attempt to divide and conquer by claiming that each paragraph is a separate and distinct reason for departure (in obvious hopes that by invalidating one an entirely new sentencing hearing will be made necessary) should be readily rejected by any reasonable individual reading and evaluating that order. For example, while paragraph number one of the sentencing order recounts from Keys' presentence investigation report his prior criminal history it is not for the purpose of simply relying on that history as a basis for departure; rather, the sentencing judge simply "notes" the following criminal history as the evidentiary background for his actual and primary reason for departure, i.e., that said criminal history and the timing and increasing severity of Keys' criminal conduct demonstrated an ever escalating pattern of more violent criminal conduct despite various punitive measures including probation and prior imprisonment which had obviously failed to curb that pattern. Paragraph three of the

order notes the severity of the injuries caused including the mental damage suffered by the victim of the petitioner's violent sexual assault and constitutes the only other reason for departure inasmuch as paragraphs four and five simply recap the sentencing court's finding that the escalating pattern of violent criminal conduct unbridled by prior punitive efforts and severity of victim injury required for the protection of society that Keys be imprisoned for a term in excess of that mandated by the guidelines. (R 36-37).

Respondent submits that the escalating pattern of violent criminal conduct/failure of prior rehabilitative efforts/protection of society finding by the sentencing court is not precluded by this court's decision in Hendrix v. State, 475 So.2d 1218 (Fla. 1985), as urged by the petitioner. This is not a case where, as in Hendrix, the sentencing judge simply relied on the defendant's prior record without more to justify departure. Here, it is the timing and escalating pattern of petitioner's continued criminal conduct as demonstrated factually by that prior record that was of import to the sentencing court and such a factor is not included on a guidelines scoresheet or tabulated in arriving at the numerical formula that normally establishes a defendant's sentence. Thus, unlike Hendrix, the escalating pattern of violent criminal conduct analysis which is clearly of great relevance and import in the sentencing scheme which must necessarily consider deterrence, (i.e., protection of society) is not already factored into the guidelines sentence analysis and does not therefore present a bar to

utilization of that factor as a basis for departure. See, Weems v. State, 469 So.2d 128 (Fla. 1985) - old juvenile dispositions not tabulated in prior record or otherwise computed in the guidelines scoresheet can be relied upon as justification for departure from the guidelines. Certainly, where as in this case, a defendant has demonstrated through his course of conduct that he has continuously graduated from lesser to more serious and more violent offenses despite prior punitive efforts, a sentencing judge may act in his discretion to adequately protect society from continued escalation of such conduct. The sentencing guidelines scoresheet does not provide for evaluation of this obviously relevant and important aspect of a defendant's criminal history since the simple tabluation of point totals for prior offenses cannot take into account their escalating nature or the various failed punitive efforts that convince a sentencing judge society cannot be adequately protected unless the defendant remains incarcerated for a very lengthy period of time.

This Court should not second-guess the considered determination of the sentencing judge who evaluated Keys' presentence investigation as well as the demeanor of the petitioner himself when he determined that the protection of the public required the departure sentence imposed. As candidly noted by the petitioner, judicial discretion in sentencing has not been abrogated by the guidelines and where as here the two reasons for departure are valid ones this Court should not sit as a seven member de novo sentencing body

passing judgment over a sentencing decision on an individual they have met only on paper.

POINT II

THE PETITIONER HAS FAILED TO CARRY HIS BURDEN OF DEMONSTRATING AN ABUSE OF DISCRETION IN THE EXTENT OF DEPARTURE BY THE SENTENCING COURT.

ARGUMENT

Petitioner asserts that under this court's decision in Albritton v. State, 476 So.2d 158 (Fla. 1985), the departure sentence imposed by the sentencing court was excessive. Respondent disagrees and submits that even if this question were a matter to be determined by this tribunal rather than the district court of appeal below there is no basis for this court to substitute its judgment for the sentencing tribunal which was more familiar with the circumstances involved through the presentence investigation and through one-on-one evaluation of Keys during sentencing.

Even after Albritton it is clear that it is the defendant who carries the burden of proof of demonstrating an abuse of discretion in the sentence ultimately imposed by the trial court. The Albritton Court referred to the decision in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), in its discussion of the appellate standard of review to be applied in matters involving judicial discretion including sentencing. In Canakaris, the court stated:

> However, where the action of the trial judge is within his judicial discretion, as in the establishment of the amount of alimony or award

of a child custody, the manner of appellate review is altogether different.

> Judicial discretion is defined as:
>
> The power exerciesd by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

1 Bouvier's Law Dictionary and Concise Encyclopedia 804 (8th ed. 1914). Our trial judges are granted this discretionary power because it is impossible to establish strict rules of law for every conceivable situation which could arise in the course of a domestic relation proceeding. The trial judge can ordinarily best determine what is appropriate and just because only he can personally observe the participants and events of the trial.

We cite with favor the following statement of the test for review of a judge's discretionary power:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that 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.

Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

In reviewing a true discretionary

> act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

(382 So.2d at 1202-1203).

The state submits that in reviewing the sentencing court's stated reasons for departure there is no basis for the seven members of this tribunal to sit as a panel of seven different sentencing judges for purposes of second-guessing the considered evaluation of the lower court properly vested with the discretion in determining matters of sentence. Clearly, the lower court after detecting the obvious pattern of escalating criminal conduct demonstrated by the petitioner and the previous failures of probationary and short term incarcerative efforts to preclude further violent conduct by Keys against society made a proper determination that the petitioner should serve out the rest of his life in prison and to implement that goal imposed the departure sentence at issue. Certainly reasonable men could differ as to the propriety of the sentencing court's decision such that this court, should under Canakaris, find that the petitioner has failed in his burden to demonstrate an abuse of that discretion clearly and properly vested in the trial court.

Obviously, the term of years imposed appears lengthy until viewed in context, in that it constituted only a four cell departure. The heinous and violent nature of Keys' criminal conduct and his prior record gave him a point total of 422 - which placed him in the ninth cell of the sexual offense category and only one point less than the tenth cell of that same category which would have authorized a sentence of between seventeen and twenty-two years (R 25-26). Under that same category the highest term of year sentence to be imposed is forty years with the next highest and final category being life imprisonment. Obviously, the sentencing court's purpose in imposing the term of year sentence was to assure that Keys served out his life in prison, the only way perceived by the court to adequately protect society from his escalating and established pattern of violent criminal conduct. Certainly, a mere four cell departure (above the nine cells already attained by the petitioner) is not excessive to meet the judges considered sentencing goal.

Keys argues that in order to attain the highest cell of his guidelines category he would need to have been convicted of four additional third degree felonies plus two additional life felonies, however, this argument misses the point for the sentencing court has already clearly determined that Keys' escalating pattern of violent criminal conduct presents too great a risk that he will in fact add to his criminal record if released from incarceration and in an even more violent way, a chance that the sentencing judge is unwilling to take. Why must we wait for Keys to perpetrate additional more violent life

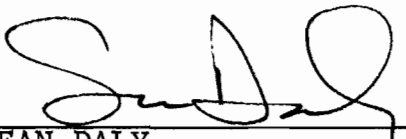
felonies or the like, as the sentencing court has determined that he most certainly will, prior to forever removing him as a threat to society? No abuse of discretion has been demonstrated.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

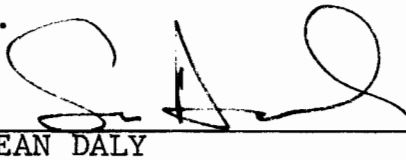


SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief on the Merits has been furnished, by mail, to Kenneth Witts, Assistant Public Defender for petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 17th day of January, 1986.



SEAN DALY
COUNSEL FOR RESPONDENT