047

IN THE SUPREME COURT OF FLORIDA

WILLIE SCURRY, JR.,

Petitioner,

-v-

CASE NO. 67,589

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

The record filed in the lower court is in four volumes. References to the record proper will be made by the symbol "R" followed by appropriate page number. Volumes II and III of the record contain the transcript of trial proceedings with consecutive pagination and references thereto will be made by the symbol "T" followed by appropriate page number. Volume IV of the record contains a transcript of the sentencing proceedings and references thereto will be made by the symbol "S" followed by appropriate page number. References to the lower court slip opinion attached to petitioner's brief on the merits will be made by the symbol "Slip op." followed by appropriate page number.

SUMMARY OF ARGUMENT

This court has already answered the certified question in Albritton v. State, 10 F.L.W. 426 (Fla., August 29, 1985), and respondent submits that the ten valid reasons given by the trial judge for his departure is more than adequate to prove beyond a reasonable doubt that the absence of any invalid reasons would not have affected the departure sentence. The lower court citations of authority are more than adequate to support its finding that ten of the reasons given by the trial judge for departure are clear and convincing.

Petitioner's unhappiness with the extent of departure is regrettable but not persuasive. If he had been sentenced to seventeen years he still would have been unhappy. It is difficult to imagine that any appellate court in the State of Florida would find that a thirty-year sentence for second-degree murder to be excessive. For the willful and intentional murder of his brother, petitioner wears the indelible mark of Cain and this court should not ease his burden by saying that the departure was excessive.

ARGUMENT

QUESTION CERTIFIED

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER Fla. R. Crim. P. 3.701 IN MAKING ITS DECISION TO DEPART FROM THE GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFIED DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING.

The above question has been answered by this court in Albritton v. State, Case No. 66,169 (Fla., August 29, 1985), where this court adopted the harmless error analysis--essentially that of Chapman v. California, 386 U.S. 18 (1967)--placing the burden of the beneficiary of the error (State of Florida) to prove beyond a reasonable doubt that the error did not contribute to the verdict. The Court then held:

> We adopt this standard and hold that when a departure sentence 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 a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence.

Id. 10 F.L.W. 426.

Petitioner was convicted of the crime of murder in the second degree, a first-degree felony, carrying a maximum penalty of life imprisonment. He was sentenced to thirty years and should

be grateful for it. In imposing the thirty-year sentence, the trial judge departed from the sentencing guidelines, setting forth in a written order thirteen reasons for the departure (R 45-47). Those reasons were quoted in full in the lower court's opinion (Slip op, 2, 3) and carefully examined as to whether same were clear and convincing.

The court found reasons numbered one and two to be valid reasons for departure, citing Garcia v. State, 454 So.2d 714 (Fla.1st DCA 1984), and Johnson v. State, 462 So.2d 49 (Fla. 1st DCA 1984). The thrust of petitioner's argument is that the trial judge erred in considering circumstances surrounding the offense. However, Garcia rejects this argument. Please note:

> We reject the interpretation urged by appellants. In our view, the traditional discretion of a sentencing court to consider all facts and circumstances surrounding the criminal conduct of the accused has not been abrogated by adoption of the sentencing guidelines. Our interpretation is supported by language found within the guidelines themselves, as well as their underlying rationale. For example, the guidelines' statement of purpose found at Rule 3.701(b)(6) provides: "The sentencing guidelines are designed to aid the [sentencing] judge in the sentencing decision and are not intended to usurp judicial discretion. . . ." The function and purpose of the guidelines is further illuminated in the authoritative contemporary analysis by Sundberg, Plante, and Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla.St.U.L. Rev. 125, 150 (1983). The authors of this work report that during the multijurisdictional sentencing guidelines project instituted in 1981 and ending April 14, 1982:

> . . . The trial judges were cautioned that at no time should sentencing guidelines be viewed as the final word in the sentencing process . . . because a factor was not expressly delineated on the score sheet did not mean that it could not be used in the sentence decision making process. The specific circumstances of the offense could be used to either aggravate or mitigate the sentence within the guideline range or, if the offense or offender characteristics were sufficiently compelling, used as a basis for imposing a sentence outside of the guidelines. The only requirement was that the judge indicate the additional factors considered. [Emphasis ours.]
>
> Id. at 142. There is no evidence that the Sentencing Guidelines Commission did not postulate use of the guidelines by sentencing judges consistent with the intent expressed in the above emphasized language once the guidelines became operative statewide. Indeed, the intended function of the guidelines is reflected in Florida Rules of Criminal Procedure 3.701(b)(3): "The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." [Emphasis ours.]

Id. at 716, 717. The lower court pointed out that reasons five and seven through twelve are valid reasons for departure, remarking that "[i]n doing so, the trial judge simply took into account the 'severity of the convicted offense and the circumstances surrounding the offense,' as contemplated by Rule 3.701(b)(3), in deciding to sentence outside the guidelines," citing Swain v. State, 455 So.2d 533 (Fla.1st DCA 1984); Mincey v. State, 460 So.2d 396 (Fla.1st DCA 1984); Deer v. State, 462 So.2d 95 (Fla. 5th DCA 1985)(reason number nine).

From the tenor of his argument with the reasons of the trial judge, affirmed by the lower court, it is obvious that petitioner is totally unable to grasp the premise that sentencing guidelines are just that--guidelines--and nothing more. Those guidelines were meant to eliminate only "unwarranted variation in the sentencing process," Rule 3.701(b), and not to usurp judicial discretion in the sentencing process. This is plainly stated in Rule 3.701(b)(6). The lower court concluded that since ten of the thirteen reasons given for departure were proper, the three impermissible reasons constituted only harmless error.

Even were this court to adopt the standard set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975), the sentence imposed by the trial judge is one with which "virtually no reasonable person could differ." At least, no person who wants to see justice done would differ with the trial judge. This, of course, does not include those individuals whose philosophy is at the opposite pole of Little Orphan Annie.

Respondent submits that the plethera of valid reasons given by the trial judge for his departure, approved by the lower court, is sufficient to show beyond any reasonable doubt that the absence of the three invalid reasons would not have affected the departure sentence. It is like when this court says in a capital case that, although the trial judge may have considered a nonstatutory aggravating circumstance, the court

can know for a certainty that it did not affect the trial judge's weighing process, particularly in light of the fact that there are no mitigating circumstances. In respondent's opinion it is difficult to find anything good that can be said about a man who murders his own brother.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES.

The reasoning of the lower court in holding that ten of the thirteen reasons listed by the trial judge for his departure were valid reasons to depart from the guidelines is adequately supported by citations of appropriate authority and need no further comment here.

Petitioner argues that this court should review the extent of the departure. The basis for this contention is that the departure was too great. It is difficult for respondent to find any logic in such an argument since petitioner could have been sentenced to life. It is submitted that a thirty-year sentence for second-degree murder cannot reasonably be viewed as excessive. Mincey v. State, supra; Deer v. State, supra; Brown v. State, 464 So.2d 322 (Fla.1st DCA 1985).

CONCLUSION

It is submitted that the record before this court when viewed in the light of the reasons given by the trial judge for his departure is more than adequate to show beyond a reasonable doubt that the absence of any invalid reason would not have affected the departure sentence. The decision of the lower court should be affirmed.

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Respondent's Brief on the Merits to Mr. Terry P. Lewis, Special Assistant Public Defender, Post Office Box 10508, Tallahassee, Florida 32302, by U. S. Mail, this 9th day of October, 1985.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel