

25th

IN THE SUPREME COURT OF FLORIDA

FILED  
APR 15 1993  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

JESSIE L. LERMA, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 67,839

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON  
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ATTORNEY FOR PETITIONER

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Rule 3.988(b), Florida Rules of Criminal Procedure	4, 5, 6



STATEMENT OF THE CASE AND FACTS

Petitioner was charged by an information filed in the Circuit Court of Orange County, Florida, with sexual battery and kidnapping. (R 24-25) On September 14, 1984, he entered a plea of guilty to sexual battery. (R 37-38, 41) He was sentenced on October 30, 1984, to spend fifteen years in prison. (R 16, 46-47)

Notice of appeal was timely filed on November 20, 1984, and the Office of the Public Defender was appointed to represent Petitioner on appeal. (R 50, 56) On October 3, 1985, on motion for rehearing or clarification, the Fifth District Court of Appeal affirmed the judgment and sentence. Lerma v. State, 476 So. 2d 275 (Fla. 5th DCA 1985). Jurisdiction was accepted by this Honorable Court on March 10, 1986.

SUMMARY OF ARGUMENT

The reasons given by the trial court for imposing a fifteen-year sentence for sexual battery in lieu of the five-year sentence recommended by the sentencing guidelines do not support the departure. The trial court considered factors relating to a potential kidnapping, a factor relating to the incident for which convictions were not obtained. The premeditation with which the crime was seen by the trial judge to have been committed was not a valid basis for departure. The trial court improperly utilized as a basis for departure factors which had already been computed into Petitioner's guidelines point total, i. e., the fact that sexual battery was committed and the physical and emotional trauma which was is provided for by points for victim injury. The trial court's specific findings relating to victim trauma were speculative and not clear and convincing. The tripling of the recommended guidelines sentence was excessive.

ARGUMENT

THE SENTENCE IMPOSED BY THE TRIAL  
COURT WAS EXCESSIVE AND BASED ON  
INVALID REASONS FOR DEPARTING  
FROM THE SENTENCING GUIDELINES.

Part of Petitioner's plea negotiations with the State of Florida was the prosecution's agreement to not recommend that the trial court exceed the sentencing guidelines (R 6, 37-38); but the investigating officer in the case spontaneously contacted the trial court and asked to be heard at Petitioner's sentencing. (R 6-7) On the basis of the officer's representations, the trial court rejected the five-year sentencing range recommended by the guidelines, and sentenced Petitioner to the statutory maximum incarceration, 15 years.

(R 43-45, 16, 46-47) Among the reasons given for the departure were (1) the victim was told she was going to be taken "two miles down the road;" (2) Petitioner premeditated his crime and escape; (3) two acts of sexual battery were committed; and (4) the victim was more physically and emotionally traumatized than the "average victim" of this degree of sexual battery. (R 43-45) These reasons do not support a departure from the sentencing guidelines, certainly not to the extent that the actual sentence imposed was triple that recommended by the Sentencing Guidelines. Rule 3.988(b), F.R.Crim.P.

The first reason, that Petitioner made statements to the victim that she "was worth \$50,000 to him" and that he "was going to take her 2 miles down the road," is based on the charge of kidnapping, which was dismissed. §787.01, Fla. Stat. (1983). Rule 3.701(d)(11) provides that:

. . . Reasons for deviating from the  
guidelines shall not include factors  
relating to the instant offenses for  
which convictions have not been obtained.

Rule 3.701(d)(11), F.R.Crim.P.; Santiago v. State, 478 So. 2d 47 (Fla. 1985).

The second reason given by the trial court was that Petitioner "intentionally and conscientiously premeditated his crime and his escape plan utilizing the victim's car (although this plan was aborted)." In Brown v. State, 11 F.L.W. 502 (Fla. 2d DCA February 21, 1986), the District Court held that premeditation is not a proper factor to deviate from the sentencing guidelines, citing Carter v. State, 468 So. 2d 276 (Fla. 1st DCA 1985); Knowlton v. State, 466 So. 2d 178 (Fla. 4th DCA 1985); and Carney v. State, 458 So. 2d 13 (Fla. 1st DCA 1984). Once again, moreover, the trial court relied on the circumstances of the charged kidnapping, of which Petitioner was not convicted.

The third reason given was: "[Petitioner] committed two (2) separate acts of sexual battery: intercourse and fellatio." Sexual battery is the offense for which Appellant was being sentenced, and was thus already scored as the primary offense at his conviction. Rule 3.988(b), F.R.Crim.P. Departure on this basis in effect utilizes the same factor twice, once in the process of computing an objective presumptive sentence and then again to justify a departure from the recommended range. This Honorable Court has held in Hendrix v. State, 475 So. 2d 1218 (Fla. 1985), that a factor may not be relied upon for departure where it has already been counted in a sentencing guidelines scoresheet total.

The fourth reason given was that the victim "was an especially susceptible female and has been more physically and emotionally traumatized than the average victim of this degree of sexual battery," and that she was subjected to the fear that she might contract infectious hepatitis from the incident. (R 45) The trial judge also cited the fact that she was unable to change jobs and communities "so as to effect some anonymity." Again, the sentencing guidelines



for sexual battery provide for assessment of points for victim injury, and reliance on the victim's having been more physically and emotionally traumatized than the "average victim" constitutes an impermissible use of a scoresheet factor as a basis for departure. Hendrix, supra; Rule 3.988(b), F.R.Crim.P. Such a reason has been found to be invalid in Smith v. State, 479 So. 2d 804 (Fla. 1st DCA 1985), a case also involving sexual battery, because "Emotional, as well as physical trauma, suffered by a victim" is inherent in the nature of the offense. The elaboration of the trial court's reason refers to the fact that the victim feared she would, but did not, contract infectious hepatitis. (R 45) This can only be considered speculative at best, and certainly not a clear and convincing reason for departure.

This Honorable Court has held that a departure sentence based on both valid and invalid reasons should be reversed and the case remanded for resentencing unless the State can show beyond a reasonable doubt that the trial court would have rendered the same sentence even in the absence of consideration of the invalid reasons. Albritton v. State, 476 So. 2d 158 (Fla. 1985). Albritton also held that an appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if the departure was reasonable. In this case, the guidelines sentence was five years. The sentence imposed was fifteen years, or triple the guidelines range. The reasons for departure included criminal factors relating to the incident for which convictions were not obtained; factors which had already been scored against Petitioner on the guidelines scoresheet (the offense itself and victim injury); premeditation; and speculation. Petitioner had no prior felony convictions, and was only twenty-two years old.

Petitioner is entitled to resentencing because the reasons cited for departure from the sentencing guidelines either were invalid or were not clear and convincing. Should this Honorable Court determine that a deviation from the guidelines may be justified by those reasons which are not clearly improper, it should nevertheless be apparent that the extent of the departure in this case is excessive, and a lesser sentence should be imposed.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the District Court of Appeal and order that this cause be remanded to the trial court with directions that Petitioner be resentenced within the sentencing guidelines.

Respectfully submitted,

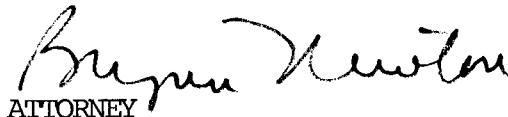
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, by hand delivery to his basket at the Fifth District Court of Appeal, Daytona Beach, Florida; and by mail to Mr. Jessie G. Lerma, 500 Orange Avenue Circle, Belle Glade, Florida 33430, this 31st day of March, 1986.



ATTORNEY