

67,870

IN THE SUPREME COURT OF FLORIDA

JORGE OCHOA,

Appellant,

and

STATE OF FLORIDA,

Appellee.

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Case No.

BRIEF OF APPELLANT

Writ of Certiorari from the District Court of Appeal

Second District

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STATEMENT OF THE CASE AND FACTS

The Appellant, JORGE OCHOA, was charged by information with one count of kidnapping with the use of a firearm and one count of armed robbery with the use of a firearm (R2). The Appellant entered a plea of guilty to each charge (R13). Following a presentence investigation and sentencing hearing, the Appellant was sentenced to forty years in State prison on each count, to run concurrently (R43,R44). The three year minimum provision of Florida Statutes 775.087(2) was imposed for count two (R44). The sentence exceeded the recommended sentence under the guidelines, which recommended not more than twelve years in State prison (R46).

The trial Judge adopted the State's suggested reasons for aggravation of the recommended guideline sentence (R17,R46). Those reasons were as follows:

- "1. The defendants knowingly created a great risk of death or bodily harm to the victim.
2. The victim was treated with particular cruelty and callousness in that he was bound, gagged, blind-folded, and threatened with death.
3. The kidnapping involved a high degree of detailed

planning, foresight and deliberation.

4. The defendants were armed with firearms.

5. JORGE OCHOA induced DONNA HARRIS GRIFFIN to participate in the crimes. Both defendants tried to recruit Donald Harris, Jr., to assist them.

6. The crimes involved an attempted taking of great monetary value - one million dollars.

7. A lengthy sentence is necessary to deter others from committing the same crimes.

8. Imposition of the suggested guideline sentence would depreciate the seriousness of the crimes."

In addition, the trial court gave the following reasons for departing from the guidelines:

"It is the Court's belief that the Defendant, Jorge Ochoa, was the prime instigator of the tragic occurrence. He conceived the plan while employed at a business owned by the victim's family. There is no question but that the Defendant stalked his victim, John Kaplan, in preparation for the commission of the crime. The crime was committed for ransom and involved an intrusion of the victim's home. There is every reason to believe that the victim would have been murdered except that he was able to free himself from bondage and flee.

The eight points filed by the Assistant State Attorney, Daphney W. Boswell, are deemed to be valid considerations. The pleading is attached to and made a part of this statement. The psychological trauma upon the victim is incalculable. The victim, John Kaplan, still complains of a loss of feeling in his left hand because of the experience. The victim continues to live in extreme fear, a condition he refers to as paranoia. The victim's family has also suffered extreme mental anguish. The entire family, including the victim, John Kaplan, no longer feel safe even in their homes. These offenses could only be more serious by reason of the murder of the victim. The fact that the victim survived the encounter is, of course, not attributable to any conduct on the part of the Defendant. Departure in this case is fully justified."

The sentence was rendered on July 25, 1984. A Notice of Appeal was timely filed on August 14, 1984 (R48), requesting that the Court of Appeal review the sentence imposed on the Appellant on the ground that the Court should not have exceeded the guidelines in the sentencing (R52). Following the withdrawal of the Public Defender, the undersigned attorney was appointed on February 25, 1985, to represent the Appellant in this appeal.

On October 9, 1985, the Second District Court of Appeal filed its opinion affirming the decision of the trial judge and certifying the following question as one of great public importance:

"When an appellate court finds that a sentencing court relied upon a reason or reasons that are permissible under Florida Rule of Criminal Procedure 3.701 in making its decision to depart from the sentencing guidelines, what criteria should an appellate court adopt in determining if the sentencing court abused its discretion in its extent of deviation?"

From this decision the Appellant filed his petition for Writ of Certiorari on October 28, 1985.

QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT ERRED IN
EXCEEDING THE SENTENCING GUIDELINES.

2. WHETHER THE EXTENT OF DEPARTURE FROM
THE GUIDELINES WAS REASONABLE.

ARGUMENT

The trial Court erred in exceeding the sentencing guidelines. The sentence imposed on the Appellant is four times the length of the average recommended sentence under the guidelines (R46).

Under Florida Statutes, Section 921.001, the failure of the trial judge to sentence within the guidelines is subject to appellate review. The purpose of the guidelines is to reduce subjectivity and unwarranted variation in the sentencing process. Florida Rules of Criminal Procedure, Rule 3.701. Departures from the presumptive sentence established in the guidelines must be articulated in writing and made only for clear and convincing reasons. Florida Rules of Criminal Procedures, Rule 3.701(b)(6), Lindsey v State, 453 So. 2d 485 (Fla. 2nd DCA 1984). In Lindsey, the Appellate Court held that speculation as to what a defendant might have done had he not been arrested does not create a clear and convincing reason for exceeding the guidelines. In Lindsey, the trial judge speculated that the defendant could have been convicted of 10 to 20 counts of selling illegal drugs if he had not been arrested after the fourth sale to undercover officers.

In the case on appeal, the written explanation given by

the trial Judge contains improper speculation which should not have been considered by the Judge in sentencing the Appellant beyond the guidelines. For instance, the trial Judge makes the statement that "there is every reason to believe that the victim would have been murdered except that he was able to free himself from bondage and flee." Yet, there was no charge of attempted murder filed against the Appellant.

Florida Rules of Criminal Procedure, Rule 3.701(d)(11), states that "reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained." Yet, it is clear that a major reason for the lengthy sentence given the Appellant was speculation on the part of the trial Judge that the victim would have been murdered except for his escape.

Another major reason given by the trial Court for deviating from the guidelines was emotional trauma experienced by the victim and his family. This was not a valid reason for the departure in this case, first, because emotional trauma is experienced in any kidnapping case and has been taken into consideration in the point system, and second, because the notes to Florida Rules of Criminal Procedure, Rule 3.701 (d)(7), allow victim injury to be scored only if there is phy-

sical trauma, which was not present here. Interestingly enough, even if there had been severe physical trauma and this had been scored, the Appellant's total points would have been only 297, which would have resulted in a presumptive sentence of 12 to 17 years, far short of the 40 year sentence imposed upon the Appellant.

The trial Judge also makes the use of firearms by the Appellant a reason for departure from the guidelines. This is improper because the use of firearms is taken into consideration in the point system, by raising the degree of each offense. By considering this as a reason for departure, the trial Judge has doubly penalized the Appellant for the same actions.

Most of the other reasons given by the trial Judge for exceeding the guidelines are factors that are common in kidnapping cases and are already considered in the point system through the seriousness of the offense. For instance, it is common in kidnapping cases for the victim to be bound and blind-folded. Since it is an intentional crime, kidnapping commonly involves deliberation and planning. And ransom demands are also present in many kidnappings. For this reason, kidnapping with the use of a firearm is a life felony.

These factors do not create a clear and convincing reason for departing from the guidelines. The definition of "kidnapping" in Florida Statutes, Section 787.01(1)(b), makes it clear that the above factors, considered by the trial Judge to be reasons for departing from the guidelines, are in fact elements of the offense of kidnapping and have been considered by the Legislature in categorizing the degree of the offense. The Statute defines "kidnapping" as "forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to: (1) hold for ransom or reward or as a shield or hostage, (2) commit or facilitate or commission of any felony, (3) inflict bodily harm upon or to terrorize the victim or another person."

There was no justification for exceeding the presumptive sentence established by the guidelines. The Appellant's only prior offenses were two misdemeanors. By imposing a sentence on the Appellant that is four times the length of the presumptive average sentence under the guidelines, the trial court has treated the Appellant as if he were a habitual criminal. This violates the very reason for the sentencing guidelines, which are designed to reduce subjectivity and unwarranted

variation in the sentencing process and to punish repeat offenders more strictly than first offenders.

The two 40-year concurrent sentences imposed on the Appellant are clearly excessive. They are an unreasonable departure from the sentencing guidelines. In its opinion, the Second District Court of Appeal emphasized that it felt the departure from the guidelines to be justified in light of the finding of the trial judge that there was severe emotional trauma to the victim and the belief of the Second District Court of Appeal that the trial judge would have entered the same sentence if the invalid reasons had not been considered.

First, it should be pointed out that the trial Court's conclusion that there was severe emotional trauma to the victim was based on testimony from the victim's father. The victim did not testify at the sentencing hearing and there was no medical or psychological evidence presented to the sentencing judge. There was no trial (the Appellant having entered a guilty plea). The sentencing judge did not have the opportunity to observe the victim or other witnesses to reach his conclusion about the victim's "severe emotional trauma." If a finding by a sentencing judge that there is severe emotional trauma to a victim without any medical or other substantial

corroborating evidence, can be used to exceed the sentencing guidelines, then the stated purpose of the guidelines, that is to reduce subjectivity, and unwarranted variation in sentencing, becomes a mockery. In this case, the trial judge used a finding of severe emotional trauma, based on highly subjective and uncorroborated testimony, to increase the Appellant's sentence from a maximum of 12 years under the guidelines to 40 years. The unreasonableness of this variation from the guidelines becomes clear when one considers that a finding of severe physical trauma to the victim would have resulted in a maximum sentence of 17 years under the guidelines, far short of the 40 year sentence imposed on the Appellant. Even if the finding of severe emotional trauma were supported by substantial competent evidence, it is inconceivable that severe emotional trauma should result in adding 28 years to the Appellant's sentence while severe physical trauma would add only 5 years to the sentence.


In Albritton v. State, 10 F.L.W. 426 (Fla. 1985), this Court held that an appellate Court should determine whether a departure from the guidelines is reasonable. It is not reasonable to use a subjective finding of severe emotional trauma to add 28 years to a man's sentence where the guidelines envi-

sion adding 5 years for severe physical trauma. There was no evidence that the victim either sought or received medical or psychological treatment for his "severe or emotional trauma." For severe physical injuries he would certainly have received medical treatment and objective evidence would have been available for the consideration of the Court. The approach used by the trial judge in sentencing the Appellant was highly subjective and, if followed by other judges, could reintroduce wide variations in sentencing for similar crimes, which the guidelines are designed to avoid. The better course is to sentence the Appellant within the guidelines or, if outside the guidelines, to a sentence of not more than 17 years, as contemplated by the guidelines for severe injury to the victim.

SUMMARY

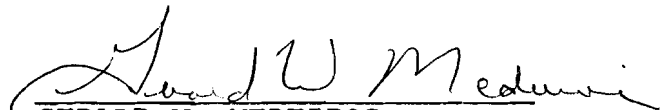
It was error to sentence the Appellant to two 40-year concurrent jail sentences where the maximum sentence allowed under the guidelines was 12 years. The decision of the appellate court affirming the sentence should be reversed and the Appellant should be sentenced to not more than 17 years in prison.

RESPECTFULLY SUBMITTED,


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CERTIFICATE OF SERVICE

I DO HEREBY certify that a true copy of the Brief of Appellant has been forwarded to William Munsey, Assistant Attorney General, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, Florida, by regular US Mail, this 3rd day of December, 1985.


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