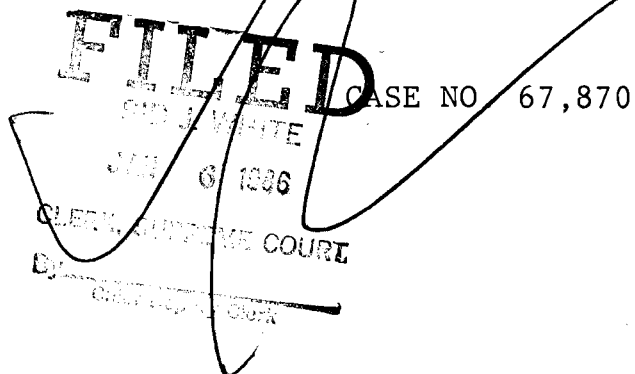


SUPREME COURT OF FLORIDA

JORGE OCHOA,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.



CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
IN AND FOR STATE OF FLORIDA

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This is a certified question from an opinion rendered by the District Court of Appeal, Second District. In this brief, the parties will be referred to by their proper names or as they stand before this Court. The letter "R" will be used to designate a reference to the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case is from a guilty plea to armed robbery and armed kidnapping. (R 8). There is a stipulation by defense counsel that the prosecution can establish a factual basis. (R 12). There was no trial. (R 6-13). The matter was referred for a pre-sentence investigation. (R 13). Sentencing was from without the guidelines. (R 46). Petitioner appealed to the Second District. The sentence was affirmed. See, Ochoa v. State, 476 So.2d 1348 (Fla. 2d DCA 1985). The mandate issued on November 11, 1985. A question certified by the Second District comes on to this Court for review.

SUMMARY OF THE ARGUMENT

The Second District asks this Court to determine what criteria (i.e. what is necessary) should an appellate court adopt in determining if the sentencing court abused its discretion in its extent of deviation. The "State" would suggest that appellate courts are put to arduous tasks in determining whether a trial court has abused its discretion in departing from the recommended range of sentencing. If appellate courts are bound to review the manner in which discretion is exercised, then criteria must be established. The "State" would urge that the only criteria necessary is that trial court has used its discretion according to its understanding and conscience. To have more formalized guidelines is perhaps the antithesis of discretion. To opine otherwise would place the burden on the district courts of discussing the evidence in the record either supporting or undermining a defendant's claim to the exercise of judicial discretion.

CERTIFIED QUESTION

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?

The question certified to this Court is couched in Ochoa v. State, 476 So.2d 1348 (Fla. 2d DCA 1985). Since the Second District rendered its opinion in Ochoa, this Court has spoken in the connecting case of Griffin v. State, No. 67,224 (Fla. December 5, 1985) [10 FLW 624] where the decision was quashed and remanded to the Second District for further remand to the trial court on the basis of Young v. State, 476 So.2d 161 (Fla. 1985) and Brinson v. State, 476 So.2d 162 (Fla. 1985). Jorge Ochoa and Donna Harris Griffin were co-defendants. There exists a comorable twist in sentencing. In Ochoa, Judge Hall points out:

It is amply evident that the trial court's main concern in its departure from the guidelines was the psychological trauma inflicted upon the victim and his family. Judge Green went into great detail in setting forth the traumatic effects upon the victim and his family; and it is evident, beyond a reasonable doubt, that eliminating the invalid reasons, Judge Green would have entered the same sentence.

(Text of 476 So.2d at 1349)

This Court, in Donna Harris Griffin, quashed the opinion of the Second District because "when a departure sentence is grounded on both permissible and impermissible reasons, the sentence should be reversed and remanded for resentencing unless the State is able to show beyond a reasonable doubt that the absence of the impermissible reason(s) would not have affected the departure sentence." See, Griffin at 10 FLW 624. Even though Ochoa is a companion case to Griffin, the "State" would urge that the Second District's opinion satisfies the Standard of Young & Brinson as Judge Green's reason for departure is established beyond a reasonable doubt that the absence of the impermissible reason would not have affected the departure sentence. If this Court should opine that this case is not ripe for determination of the certified question in light of Griffin, then the same question has been certified in Booker v. State, Nos. 85-408, 85-409, 85-410, consolidated (Fla. 2d DCA December 13, 1985) [10 FLW 2751]. In Booker, Judge Scheb elaborates on the question before this Court:

Defendant's final point on appeal is the most troublesome. In Albritton v. State, No. 66,169 (Fla. Aug. 29, 1985) [10 F.L.W. 426], the Florida Supreme Court stated:

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 is reasonable.

The defendant argues that the trial court abused its discretion in this case by imposing a twenty-five-year sentence, which

is ten times greater than the two and one-half years maximum recommended under the guidelines. Admittedly, the twenty-five-year sentence seems to be somewhat harsh.

We find the teachings of *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980), instructive on review of judicial discretion. There, our Supreme Court cited with favor the following test from *Delno v. Market Street Railway Co.*, 124 F.2d 965, 967 (9th Cir. 1942), for review of a trial 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.

(*Canakaris*, 382 So.2d at 1203)

In view of the written reasons for departure and the record in this case, we cannot say that it was unreasonable for the trial judge to sentence the defendant as he did in this case. But see *McBride v. State*, No. 84-1169 (Fla. 4th DCA Nov. 6, 1985) [10 F.L.W. 2488], holding that the trial judge abused his discretion in exceeding the guidelines sentence by five times.

The Supreme Court's ruling in *Albritton* has assigned the district courts of appeal the arduous task of determining whether a trial court has abused its discretion in departing from the recommended range of sentencing. Since no criteria have been identified to assist us in performing that function, we certify the following question, as we did in *Ochoa v. State*, No. 84-1849 (Fla. 2d DCA Oct. 9, 1985) [10 F.L.W. 2337], as one of great public importance:

WHEN AN APPELLATE COURT
FINDS THAT A SENTENCING

COURT RELIED UPON A REASON
OR REASONS THAT ARE PER-
MISSIBLE 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?

(Text of 10 FLW at 2752)

The Second District recognizes the authority of Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) and Delno v. Market Street Railway Co., 124 F.2d 965, 967 (9th Cir. 1942) for review of a trial judge's discretionary power.

The term discretion connotes criteria from a wide base. For example, there is basic policy discretion; reasonable discretion; sole discretion; unconstrained discretion. Discretion is subject to clear abuse and/or improper use. There is no easy answer to the question of what criteria an appellate court should adopt in its determination if the sentencing court abused its discretion in its extent of deviation. This is an arduous task faced by the Florida district courts. When applying discretionary criteria to the extent of sentencing deviation, the district courts do not have the opportunity of either viewing the victim, witnesses to the crime, or the criminal. Much which goes into a reasonable man review of the propriety of the sentencing court's action can never be appreciated by the district court because these impacts cannot and can never be communicated to an appellate court in a cold record proper. Many of the sentencing guideline cases coming on for appellate

review contain this issue. See, Booker v. State, Nos. 85-408, 85-409, 85-410, consolidated (Fla. 2d DCA December 13, 1985) [10 FLW 2751].

The "State" would suggest that this intertwined dichotomy evolves from the premise that to arbitrarily establish a fixed basis and/or policy to govern every sentencing guidelines case is the antithesis of discretion. Sentencing courts have inherent power to determine sentencing questions, when a basis exists, for which responsibility is controlled by the personal judgment of the court. So it follows here in Judge Green's order. At bar, the prosecution proffered a basis for sentencing outside the guidelines. (R 17). Jorge Ochoa, through counsel, replied. (R 18). The sentencing court adopted the basis submitted by the prosecution. (R 46). In fact, Judge Green found: "The psychological trauma upon the victim is incalculable." (R 46). There was no trial. This case was a guilty plea with much investigation accomplished and communicated prior to sentencing. There is no question but that Judge Green rendered a sentence that is right and equitable under the circumstances and the sentencing guidelines law. But, the question still looms as to what criteria the appellate evaluators must apply to the discretion applied by the sentencing evaluator. In other words, what is necessary for the appellate court to determine if discretion has been abused? For example, what does the judiciary look to in opining whether a search warrant is lawfully issued? Was the warrant issued on probable cause with supporting oath or affirmation? Does the warrant describe the

place to be searched and identify the individuals or things to be seized? Was the warrant executed in a reasonable manner? This is necessary criteria.

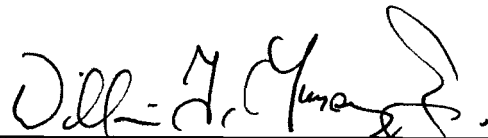
In United States v. Shaughnessy, 347 US 260, 98 L Ed 681, 74 S.Ct. 499 (1954), Justice Clark, in writing for a sharply divided Court addressing a deportation under the discretion of the Attorney General states: "It is important to emphasize that we are not here reviewing the reversing of the manner in which discretion was exercised. If such were the case, we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief." 98 L Ed at 687. There the Attorney General declined to use his discretionary power vested by Congress. If discretion is used according to the recipient's understanding and conscience, then what other criteria must an appellate court look to? The "State" would suggest that in cases such as this, the district courts must be afforded the criteria to make judicial leaps of faith in the discretionary findings of the trial court.

CONCLUSION

Wherefore Respondent would urge this Court to render an opinion giving the district courts of appeal the widest possible latitude in the criteria of this court establishes in determining if the sentencing court abused its discretion in its extent of deviation in sentencing guideline cases.

Respectfully submitted,

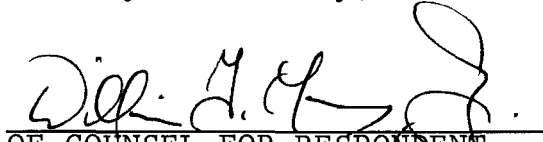
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Gerald W. Medeiros, Esquire, 2600 Industrial Park Drive, Suite E, Lakeland, Florida 33801, this 2nd day of January, 1986.



OF COUNSEL FOR RESPONDENT