

SUPREME COURT OF FLORIDA

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JAN 9 1981

CLERK, SUPREME COURT

By: Deputy Clerk 370
CASE NO. 87-1370

JORGE OCHOA,)
Petitioner,)
vs.)
STATE OF FLORIDA,)
Respondent,)
_____)

PETITIONER'S SUPPLEMENTAL BRIEF

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ISSUE

What effect does the amending of Section 921.001 (5), Florida Statutes, to provide that "the extent of departure from a guideline sentence shall not be subject to appellate review" have on judicial review of the sentence imposed in this case.

ARGUMENT

The amending of section 921.001 (5), Florida Statutes, to foreclose appellate review of the extent of departures from sentencing guidelines, should have no effect on judicial review of this case. Despite the amendment, the statute continues to provide that "the failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to Chapter 924."

As was argued in petitioner's initial brief, there was no legal justification for exceeding the sentencing guidelines in this case. The reasons advanced by the trial judge were, for the most part, matters of speculation. Departures from the guidelines must be made only for clear and convincing reasons. Lindsey vs. State, 453 So.2d 485 (Fla. 2nd DCA 1984). The written reasons given by the trial judge were neither clear nor convincing, as they cannot be when based mostly on speculation. The primary reasons given for exceeding the guidelines were that "the psychological trauma upon the victim is incalculable" and "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." Both of these reasons were mere speculation on the part of the trial judge. There was no trial, the defendant having entered a plea. The victim did not testify before the judge at any time and he was not present at the sentencing hearing. There

was no psychological or medical evidence presented to the trial judge.

In affirming the decision of the trial judge to exceed the guidelines, the Second District Court of Appeal relied on its previous decision in Green vs. State, 455 So.2d 586 (Fla. 2nd DCA 1984) that the traumatic nature of the offense in itself was a valid reason for departure. In its opinion in the instant case, the Second District Court of Appeal states:

"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."

This opinion was written prior to the State vs. Cote case entered by the Supreme Court on April 13, 1986. In Cote, this Court held that emotional and psychological impact on the victim did not constitute a clear and convincing reason for departure from sentencing guidelines. Although Cote involved aggravated assault, there is no reason why the decision should not apply as well to kidnapping. There will be emotional trauma in nearly every conceivable kidnapping case. If departure is allowed for this reason, and if appellate courts cannot review the extent of departure, then the sentencing guidelines shall not achieve their purpose of reducing subjectivity and unwarranted variation in the sentencing process. Florida Rule of Criminal Procedure, Rule 3.701. In the instant case, if psychological trauma is not a clear

and convincing reason for departing from the guidelines, then there is no clear and convincing reason for departure and the trial court's decision to exceed the guidelines should be reversed. If reversed on that basis, the amendment to Section 921.001 (5), Florida Statutes, does not apply. The effect of the amendment, then should be to encourage appellate courts to take a very close look at departures from sentencing guidelines to ensure that only those departures which are made for truly "clear and convincing" valid reasons should be allowed to stand. To ensure that the purpose for establishing sentencing guidelines is achieved, departures should be few and far between.

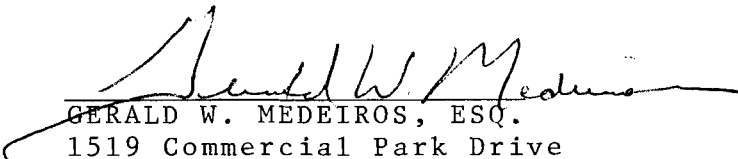
In cases where there are clear and convincing reasons for departing from the sentencing guidelines, the amendment to the statute comes directly into play. The issue becomes whether the Legislature can constitutionally restrict the appellate courts from reviewing a trial judge's discretion in the extent to which the guidelines are exceeded.

Certainly the Legislature can set minimum and maximum sentences for crimes. This is a matter of substance, not procedure. Benyard vs. Wainwright , 322 So.2d 473 (Fla. 1975). However, the Florida Constitution (Article II) provides that practice and procedure in all courts is governed by rules adopted by the Supreme Court. Gonzalez vs. Badcock's Home Furnishings Center, 343 So.2d 7 (Fla. 1977). Sentencing guidelines are in some ways substantive and in some ways procedural. The Legislature has chosen to leave an element of discretion with the trial judge regarding sentencing within limits set by statute. The exercise of this discretion is

clearly a judicial function which should be subject to rules of procedure established by the Supreme Court and review by appellate courts to ensure that these rules are being followed. Under the doctrine of separation of powers, the Legislature may not hinder the exercise of inherently judicial powers. Simmons vs. State, 36 So. 2d 207 (Fla.). It has been held that a statute does not infringe upon the constitutional division of responsibilities between the Legislature and the Judiciary so long as it does not wrest from the Courts the final discretion to impose sentence. State vs. Benitez, 395 So.2d 514 (Fla. 1981). It is submitted that the amendment to section 921.001 (5), Florida Statutes, does just that and is unconstitutional.

SUMMARY

There were no valid clear and convincing reasons given for departing from the sentencing guidelines and the trial court's decision to do so should be reversed. Further, the amendment to Florida Statutes, section 921.001 (5), purporting to foreclose appellate courts from reviewing the extent of departure from sentencing guidelines is an attempt by the Legislature to interfere with appellate court supervision of discretionary judicial acts and is therefore a violation of separation of powers and is unconstitutional.


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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 William I. Munsey, Jr., 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, this 29th day of December, 1986.


GERALD W. MEDEIROS, ESQ.