

IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

CREED MARTIN VANOVER,)
)
 Petitioner,)
)
 v.)
)
 THE STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 68,254

RESPONDENT'S BRIEF ON JURISDICTION

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OTHER AUTHORITIES

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Fla. R. Crim. P. 3.701(d)(11)	3

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts presented by Petitioner in his initial brief except where specifically pointed out in Argument.

SUMMARY OF THE ARGUMENT

There is no holding from either this Court or any Florida district court of appeal which prohibits an appellate court from going to the record proper to find factual support for the written reasons for departure. Also, there is no legislative or judicial intent to eliminate victim injury from being subjectly factored into a guidelines sentence.

ARGUMENT

This is another of the legion of sentencing guidelines cases to reach this Court. In the trial court, Judge O'Brien rendered the following five (5) written reasons for departure:

- (1) The charge of Aggravated Battery with a Firearm requires a minimum mandatory sentence of at least three years in the Department of Corrections;
 - (2) The offense of shooting Kim Carevic was done without any moral or legal justification;
 - (3) The defendant intended to murder Kim Carevic, and it was only by a stroke of luck that Kim Carevic avoided being murdered;
 - (4) The manner of the shooting of Kim Carevic, being at close range and at the body of the victim, created a great risk of serious bodily harm and/or death to the victim; and
 - (5) This was a particularly aggravated set of circumstances which sets this case far and above the average Aggravated Battery.
- (R. 44).

Initially, Petitioner finds fault with the following reasons:

(a) The offense of shooting Kim Carevic was done without any moral or legal justification.

(b) This was a particularly aggravated set of circumstances which sets this case far and above the average aggravated battery.

Petitioner finds these factual findings improper because of his defense: self-defense. That a jury acquitted Petitioner (R. 33) of Count One (R. 33 - 36), is urged as a matter of consequence. The rendition was not transcribed. (R. 531).

An acquittal is nothing more and nothing less in this case than a jury pardon which may be handed down for a myriad of reasons. There was no legal justification to shooting Kim Carevic and the conviction reflects same; and, the facts of this case leave no doubt but that this crime is elevated above the average aggravated battery. Petitioner urges conflict on the basis of Fla. R. Crim. P. 3.701(d); Sloan v. State, 472 So.2d 488 (Fla. 2d DCA 1985). What Petitioner overlooks is that the aggravated battery is a crime against a person whether that crime be homicide, assault, battery, aggravated battery, child abuse, a family disturbance, and/or an offense against the liberty of a person. In part, Fla. R. Crim. P. 3.701(d)(11) states: "Reasons for deviating from the guidelines shall not include factors relating to the instant offense for which convictions have not been obtained." For this proposition, Petitioner sets forth two more reasons as improper:

(c) The defendant intended to murder Kim Carevic and it was only by a stroke of luck that Kim Carevic avoided being murdered;

(d) The manner of shooting of Kim Carevic, being at close range and at the body of the victim created a great risk of serious bodily harm and or death to the victim.

Petitioner then sets forth Davis v. State, 476 So.2d 303 (Fla. 2d DCA 1985); Lewis v. State, 475 So.2d 1367 (Fla. 2d DCA 1985); and, Ross v. State, 478 So.2d 480 (Fla. 1st DCA 1985) for conflict. Both Ross and Davis hold that victim injury is not to be factored into a departure because the offense itself automatically factors itself into the scoresheet; and, Davis disapproves transcribed oral pronouncements as reasons for departure.

What Petitioner overlooks is that the case at bar does not conflict with the cases cited because inherent in the one at bar is the old common law doctrine of transferred intent. To recognize otherwise would be an unwarranted gift.

The opinion by Judge Frank in Marshall v. State, 468 So.2d 256 (Fla. 2d DCA 1985) disapproved breaches of Fla. R. Crim. P. 3.701(d) (11); however, the holding is a departure from guidelines sentence is subject to affirmance if one clear and convincing reason is stated as a valid reason for departure. This position was restated

in Sloan v. State, 472 So.2d 490, 491 (Fla. 2d DCA 1985); "Notwithstanding that we invalidate two of the reasons considered by the trial court to be sufficient for departure, we have held that if only one remaining reason is sound, i.e., clear and convincing, the enhanced sentence will be affirmed." In Davis v. State, Judge Ervin distinguishes between oral and written reasons for departure. If the oral reason is distinct from the written reason, then it is improper to refer to the oral ones; however, the oral reasons at bar set forth the basis for the written ones. Thus, they are compatible and not indistinct. Judge Mills in Ross v. State, 478 So.2d 480 (Fla. 1st DCA 1985) relied on this Court's opinion in Albritton v. State, 476 So.2d 158 (Fla. 1985) finding that where valid and invalid reasons exist for departure, the sentence should be reversed and remanded for resentencing unless the prosecution is able to establish beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence. A review of this record by the Second District suggests that the trial court would have sentenced Petitioner in the same manner even if invalid reasons exist. See also Francis v. State, 475 So.2d 1366 (Fla. 2d DCA 1985) where the Second District was unable to determine under the reasonable doubt standard that the impermissible reasons did not affect the departure standard.

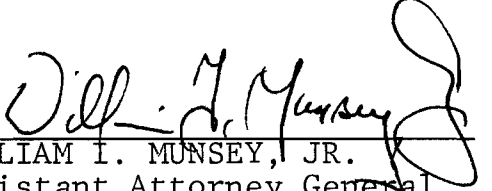
There is no conflict of decisions as the case at bar
[Vanover v. State, 481 So.2d 31 (Fla. 2d DCA 1985) reh. den.
January 10, 1986] harmonizes with all holdings cited by Petitioner.
There is no authority to prohibit an appellate court from going to
the record to substantiate written reasons for departure. That is
all that was done at bar. Nothing less and nothing more.
The decision of the Second District must remain intact.

CONCLUSION

Based on the foregoing reasons, argument, and authority, Respondent would pray that this Honorable Court make and enter an Order denying discretionary review as no conflict of decisions exist.

Respectfully submitted

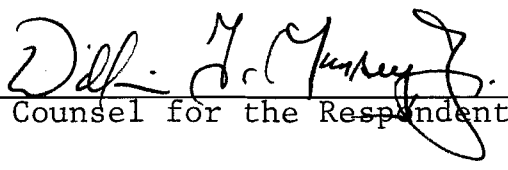
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Regular Mail to ALLYN GIAMBALVO, Assistant Public Defender, Criminal Courts Complex, 5100 144th Avenue North, Clearwater, Florida 33520 on this 27th day of February, 1986.


Of Counsel for the Respondent