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IN THE SUPREME COURT OF FLORIDA

CREED MARTIN VANOVER, :

Petitioner, :

vs. : Case No. 68,254

STATE OF FLORIDA, :

Respondent :

_____ :

PETITIONER'S BRIEF ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

Allyn Giambalvo
Assistant Public Defender
Criminal Court Building
5100 - 144th Avenue North
Clearwater, Florida 33520

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Petitioner Creed Martin Vanover was charged with two counts of Aggravated Battery. The trial of Petitioner was held on September 19-21, 1984, before the Honorable Gerard O'Brien, Jr., Circuit Judge. After hearing the testimony, the arguments, and being instructed by the court on the law, the jury deliberated and acquitted Petitioner of one count, but found him guilty on the remaining count. Appellant was adjudicated guilty and sentenced to ten years imprisonment with the three year mandatory minimum imposed. The guideline recommendation was community control or twelve to thirty months incarceration.

Petitioner filed a Notice of Appeal to the Second District Court of Appeal, Lakeland, Florida. In a written opinion the court held that the trial court's reasons for departure were valid, i.e., that the court could consider all the circumstances surrounding the incident, the severity of the victim's injuries, and the resulting danger to life even though victim injury was

1. The actual recommendation was community control/twelve to thirty months, however, as the three-year minimum mandatory provisions for use of a firearm were applicable they took precedence. F.R.Cr.P. 3.701(d)(9.)

scored so as to arrive at the recommended sentence. The District Court of Appeal also held that the trial judge's reasons, could be "fleshed out" by reference to remarks made at the sentencing hearing. The Second District Court of Appeal affirmed Petitioner's conviction and sentence and denied Petitioner's Motion for Rehearing. Petitioner now requests this Court to accept jurisdiction pursuant to F.R.App.P. 9.030(2)(A)(iv).

STATEMENT OF THE FACTS

Kenneth Carevic, age twenty-five, testified he and his brother Kim visited Petitioner's home at 7401 Central Avenue, Apartment 1 in St. Petersburg. His brother, Kim, worked with Petitioner and wanted Petitioner to cut some panes of glass. (R106-107)

Petitioner came to the door in a towel as he had just gotten out of the shower. After Petitioner dressed, they sat and talked and split the three beers Kim had brought. (R108) A man by the name of "Al" dropped in and brought a bottle of wine which they also shared. Everyone then was to contribute to buying a six pack which Al was going to go get. (R109) Al went to the door to leave, Kim got up and went to the bathroom, and Kenneth took Kim's seat. (R111) Petitioner then reached over and took a gun from underneath the sofa cushions, backed up into the kitchen and said, "I'm going to blow your mother-fucking brains out." (R112) Kenneth laughed, thinking Petitioner was joking and asked to see the gun. Petitioner repeated his statement and then shot Kenneth in the mouth. (R113) Kenneth denied that either he or his brother had a weapon or had come at Petitioner. (R114) Kenneth ran for the door and Kim came running out behind him. Kenneth and Kim jumped in the car and Kenneth drove them to the hospital. (R116)

Kim Carevic, age twenty-seven, testified he had come to know Petitioner at work and they had had a few beers together. He and Kenneth had gone to Petitioner's house for the purpose of getting some glass cut. They sat, drank some beer, and started talking. (R145) A guy named Arnold also came by and joined them. The conversation centered around guns. Arnold suggested they chip in and buy a six-pack. (R147) Arnold was going to go across the street to the 7-11 and get it. After Arnold left, Kim went to the bathroom. (R149) Outside he could hear Petitioner say something to the effect of, "I'll blow your head off." When he came out of the bathroom, Kenneth sat where he had been sitting earlier. (R151) He looked over at Kenneth who suddenly opened his mouth and blood came out. Kenneth then took off out the door and Kim stood up. He saw Petitioner walk around the corner from the kitchen. Petitioner told him to get out and then fired again. The shot entered his arm and went into his back. (R152) Kim then ran outside and he and Kenneth drove to the hospital. (R155)

Dr. Sushilla Becum testified that she had treated both Kenneth and Kim Carevic at the emergency room. Both had sustained gunshot wounds. (R169) Kenneth's bullet had gone through the right side of his mouth and lodged in the right posterior base of his tongue. (R170) Kim had two flesh wounds on his left back and left upper arm. (R171)

Petitioner, Creed Martin Vanover, age fifty-three testified he knew Kim Carevic, having worked with him at the Sunset Residence Hotel. On the evening in question, Kim and Kenneth had come to his apartment and asked if he wanted to drink a beer with them. Petitioner said okay and they each had one. The Carevic's then told Petitioner to go across the street and get some more beer. (R254) Petitioner said he hadn't had his dinner yet and why didn't one of them go. The Carevic's still continued to insist Petitioner go. Petitioner was afraid to leave the Carevic's in his house because they knew he had a substantial sum of money there. (R254-255) Then the Carevic's started telling Petitioner how mean they were and how many persons they had cut and stomped on and kicked around. Kenneth was doing most of the talking and arguing with Petitioner. Arnold heard them arguing, came in and said he would go get the beer. (R257) After Arnold left, Kenneth shoved Petitioner onto the sofa and said, "I thought I told you to go get me some beer." Petitioner said Arnold had gone to get it. (R258) Kenneth then started screaming that he was going to take Petitioner outside and whip his ass. Petitioner stood up again, whereupon, Kenneth hit him and knocked him back down. (R259) Petitioner then told the Carevic's he wanted them to leave his house. Kenneth sat down and said he was not leaving. Kim meanwhile was leaning up against the wall. Petitioner asked him to take Kenneth and get out of his house.

Kim said they weren't going anywhere until the guy came back with the beer. Petitioner asked him to take Kenneth and get out of his house. Kim said they weren't going anywhere until they guy came back with the beer. Petitioner concluded they had essentially taken over, so he pulled his pistol from under the sofa cushion thinking he would frighten them and they would leave. (R261) When he did so, Kenneth opened his mouth and said, "Old man, if you got enough nerve to pull that trigger, shoot me in my mouth because if you don't shoot me; I'm going to take it away from you and shoot you. Petitioner then begged Kim to take Kenneth and leave because he would shoot if they didn't. Kim said they weren't going anywhere and then Petitioner shot Kenneth in the mouth. Kim jumped towards him and Petitioner thought he was going to grab him. Petitioner stated he didn't think he hit either brother because they both ran out the door. (R262)

SUMMARY OF ARGUMENT

None of the trial court's enumerated reasons presents clear and convincing reasons for departure, and the Second District Court of Appeal's opinion expressly and directly conflicts with its own earlier opinion in Francis and that of the First District Court of Appeal in Ross and Davis.

ARGUMENT

Petitioner was sentenced to ten years imprisonment, a significant departure (6 cells) from the guideline recommendation of three years. The trial court's stated reasons for departure were as follows:

> 1.) The offense of shooting Kim Carevic was done without any moral or legal justification.
>
> 2.) The defendant intended to murder Kim Carevic and it was only by a stroke of luck that Kim Carevic avoided being murdered.
>
> 3.) 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.
>
> 4.) This was a particularly aggravated set of circumstances which sets this case far and above the average aggravated battery.

Petitioner contends that none of the aforementioned reasons justify a departure from the guideline recommended sentence. Firstly, reasons #1) and 4) are improper because they are "ambiguous and lacking in clarity for failure to relate to any identified fact in the context of the case." Burch v. State, 462 So.2d 548 (1st DCA 1985). It should also be noted that Petitioner did justify his actions on the grounds of self-defense and his apprehension that the so-called "victims" were about to take his money and beat him up. The jury did not discount Petitioner's testimony, as the trial court and Second District Court of Appeal apparently did, because they saw fit to acquit

Petitioner of one count, [the alleged aggravated battery on Ken Carevic.]

It is certainly not unreasonable to assume that the jury decided Petitioner was justified in shooting Ken Carevic, because he was the instigator of the situation, but not justified in shooting Kim Carevic who stood back and became aggressive toward Petitioner only after Ken was shot. The jury was not unwarranted in disbelieving the victims' story that a fifty two year old man with a previously unblemished record would one afternoon suddenly without warning shoot two people without provocation or justification.

Reasons #2 and #3 attempt to justify departure on the basis of what could have occurred, not what actually happened. The trial court makes mention that Petitioner intended to murder the victim and would have done so, but for the intervention of fate. This is improper justification for departure because it in essence penalized Petitioner for a higher crime (attempted first degree murder) which he was never charged with or convicted of. This is clearly prohibited by F.R.Cr.P. 3.701(d)(11), and is contrary to Sloan v. State, 472 So.2d 488 (2d DCA 1985), Marshall v. State, 468 So.2d 255 (2d DCA 1985), and Dawkins v. State, (2d DCA April 9, 1986)[11 F.L.W. 873]. Also, that Petitioner intended to murder the victim, Kim, is totally unsubstantiated by the record. It is error to depart from the

guidelines on the basis of reasons which are tenuous and speculative. Baxter v. State, (5th DCA May 15, 1986)[11 F.L.W. 1156].

Both the trial court and the Second District Court of Appeal erred in considering victim injury as a valid reason for departure for several reasons. First, as an element of the crime of aggravated battery, Petitioner was scored 24 points for victim injury. Factors already taken into account in calculating the recommended sentence can never support departure. Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

The Second District Court of Appeal's opinion expressly and directly conflicts with the holdings in Ross v. State, 478 So.2d 480 (1st DCA 1985). The First District in Ross held that where the nature and extent of the victim's injury was an element of the statute under which the defendant was convicted and therefore already factored into the scoresheet, it did not constitute a valid reason for departure. The same holding was made in another Second District case, Francis v. State, 475 So.2d 1367 (2d DCA 1985) where the court specifically stated that for a conviction of aggravated battery the trial court could not use the extent or severity of the attack on the victim as grounds to depart because it was already factored in.

Secondly, victim injury is an inherent component of the crime of aggravated battery.

784.045. Aggravated battery

(1) A person commits aggravated battery who, in committing battery:

(a) Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or

(b) Uses a deadly weapon.

The trial court cannot use an inherent component of the crime in question to justify departure from the guidelines. State v. Cote, Case No. 67,166 [11 F.L.W. 137](Fla. 1986), Steiner v. State, 469 So.2d 179 (3d DCA 1985).

Thirdly, the court scored the victim injury as "moderate". This would seem appropriate as the wounds sustained were not life threatening. However, it would seem totally inappropriate to use moderate victim injury as a reason for departure because departures are to be based only on egregious circumstances far beyond the norm for such situations. Tompkins v. State, 483 So.2d 115 (2d DCA 1986), Reid v. State, (2d DCA May 23, 1986)[11 F.L.W. 1192].

Reason #4 is patently improper because it is not "clear and convincing". It is not tied to any articulated fact or facts which would substantiate such a blanket statement. Secondly, circumstances surrounding the offense are invalid reasons for departure where no egregious circumstances are shown. Neal v. State, (2d DCA April 8, 1986)[11 F.L.W. 914], State v. Mischler, Case No. 66,191 [11 F.L.W. 139](Fla. 1986).

The Second District Court of Appeal also used the trial court's oral pronouncements at sentencing to "flesh out" the admitted paucity of factual support for the trial court's written reasons. This practice is in express and direct conflict with the holding in Davis v. State, 476 So.2d 303 (1st DCA 1985) which states that upon review any justification for departure not in writing, although compelling, may not be considered. In order to be a clear and convincing reason for departure, it must be credible and proven beyond reasonable doubt. "They must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy that departure is warranted." State v. Mischler, supra. The trial court's reasons herein failed totally to meet this standard.

As none of the trial court's enumerated reasons presented clear and convincing reasons for departure, Petitioner's sentence should be vacated and his case remanded for resentencing in accordance with the guideline recommendation.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner respectfully asks this Honorable Court to vacate Petitioner's sentence and remand for resentencing in accordance with the guideline recommendation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to William I. Munsey, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, June 20, 1986.

Respectfully submitted,

Allyn Giambalvo

Allyn Giambalvo
Assistant Public Defender