IN THE SUPREME COURT OF FLORIDA

JOHN ANTHONY CASTEEL, :

Petitioner, :

vs. : CASE NO. 68,260

STATE OF FLORIDA, :

Respondent. :

_____:

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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MISCELLANEOUS

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I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and the appellant in the lower tribunal. The parties will be referred to as they appear before this Court. A two volume record on appeal will be referred to "R" followed by appropriate page number in parenthesis. An eight volume transcript will be referred to as "T". Attached hereto as Appendix A is a copy of the lower tribunal's opinion. Appendix B contains a list of recent District Court of Appeal cases in which the sentence was reversed. Appendix C contains a list of recent District Court of Appeal cases in which the sentence was affirmed.

II STATEMENT OF THE CASE AND FACTS

By information filed December 14, 1983, petitioner was charged with sexual battery with the use of a deadly weapon, and burglary of a dwelling with an assault and with a deadly weapon (R-6-7). The cause proceeded to jury trial on September 17-21, 1984, and at the conclusion of petitioner was found guilty as charged on both counts (R-49-50). A summary of the facts appears in the District Court's opinion:

> Evidence presented at trial established the following: defendant attended a poker game at which he consumed about 15 beers and smoked two marijuana joints, after smoking four joints that afternoon. Defendant knocked on victim's door shortly after 10:00 p.m. to ask if she was attending the party. She said "no" and locked the door. She dozed off but awoke to a knock at the door. As she opened the door, defendant struck her in the face, breaking her jaw, displayed a knife, and ordered her to have oral sex with him. He then cut her blouse with the knife, forced her to undress and had vaginal sex with her. Victim's 15-year-old son was awakened by a scream, observed defendant on top of victim, and heard defendant's demands on the victim. The son called the police and waited in the bedroom. Officers responded to the scene, heard a cry for help, entered the victim's apartment, removed defendant from on top of the victim, and handcuffed him. The knife was found under a pillow. Defendant stated to arresting officers that the victim invited him to engage in sexual intercourse, and the knife belonged to the victim. He later made a similar statement to another detective.
>
> (Appendix A at 4, footnote 3).

On October 5, 1984, petitioner was adjudicated guilty of both crimes and sentenced 30 years in state prison on

each count to run concurrently, which were in excess of the 17-22 range recommended by the sentencing guidelines (R-66-74; T-957-91). On appeal, petitioner argued two trial errors and one sentencing error. The trial errors were not addressed by the lower tribunal. Petitioner attacked the five reasons for departure given by the sentencing judge:

> 1. The offenses for which the Defendant was sentenced involved the use by him of a dangerous weapon, to wit: a knife.
>
> 2. The offenses for which the Defendant was sentenced were committed in a calculated manner without pretense of moral or legal justification.
>
> 3. The Defendant's prior history of criminal activity and behavior establishes a pattern of conduct that renders him a continuing and serious threat to the community.
>
> 4. The offense of Sexual Battery for which the Defendant was sentenced was committed in the view of the victim's son, who was 15 years of age at the time of the offense, and even though the Defendant might not have been aware of the boy's presence, the Defendant's offense will have a lasting traumatic effect on the boy as well as the victim.
>
> 5. The Defendant shows little or no remorse for having committed the offenses for which he was sentenced. At the trial he testified that he was intoxicated and did not remember what happened. Such testimony is contrary to that of the victim and the testimony of the police officers with respect to Defendant's statements at the scene of the crime.
>
> (Appendix A at 2).

The First District found reasons #1, #2, #4 to be valid. The court strucks reasons #3 and #5, but nevertheless

affirmed (Appendix A at 2-3). The First District also certified the following question to this Court:

> When an appellate court finds that a sentencing court relied on both valid and invalid reasons for departure, what factors should the court weigh in determining whether it is convinced beyond a reasonable doubt that the absence of the invalid reason or reasons would not have affected the trial court's exercise of its discretion in departing from the guidelines.
>
> (Appendix A at 3).

Judge Zehmer wrote a separate opinion, dissenting from the affirmance, but concurring and certifying the question (Appendix A at 5-6).

On January 30, 1986, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the district courts of appeal are confused as to what the proper remedy should be when some reasons for departure are sustained, and some are struck. In light of that confusion, petitioner asserts that this Court should adopt a per se rule of reversal anytime an appellate court finds one or more reasons for departure to be invalid. In the alternative, petitioner asserts that this Court must further refine the test for reversal, and stress that in only rare cases should the sentence be affirmed.

In Issue II, petitioner will argue that the three reasons for departure, which were approved by the lower tribunal, should be declared invalid. Petitioner should receive a guideline sentence on both convictions.

IV ARGUMENT

ISSUE I

THIS COURT SHOULD ADOPT A PER SE RULE OF REVERSAL ANYTIME THE APPELLATE COURT FINDS ONE OR MORE REASONS FOR DEPARTURE TO BE INVALID, REGARDLESS OF THE PRESENCE OF A VALID REASON, OR, IN THE ALTERNATIVE REAFFIRM THE VIEW THAT THE STATE MUST PROVE A REASONABLE DOUBT THAT THE INVALID REASONS DO NOT AFFECT THE DEPARTURE SENTENCE.

In Albritton v. State, 476 So.2d 158 (Fla. 1985), this Court was faced with the task of instructing the District Courts as to their role in reviewing departure sentences when they found some reasons for departure should be valid and some to be invalid. Three alternatives were available:

> Broadly, there are three potential answers to the question: (1) reliance on an invalid reason, regardless of the presence of a valid reason, is per se reversible error; (2) reliance on a valid reason, regardless of the presence of invalid reasons, is per se affirmable; or (3) reliance on valid and invalid reasons should be reviewed upon a harmless error analysis.

Id., at 159. This Court rejected the first two alternatives and adopted the third:

> We adopt this standard and hold that when a departure sentence is grounded on both valid and invalid reasons that the sentence should be reversed and the case remanded for resentencing unless the state is able to show beyond a reasonable doubt that the absence of invalid reasons would not have affected the departure sentence.

Id., at 160. Petitioner submits that in the opinion

subsequent to Albritton, the District Courts of Appeal have unevenly applied this test. Petitioner submits that a per se rule of reversal is the best solution to the problem. In the alternative, petitioner submits that a further refinement of the reasonable doubt/harmless error standard is necessary.

As the attached Appendix B and Appendix C demonstrate, the District Courts have employed a mere counting process in deciding how to dispose of a case when some reasons for departure are struck and some are approved. In the overwhelming majority of cases, when more reasons are struck than are approved, the District Courts reverse for resentencing: Allen v. State, 476 So.2d 309 (Fla. 2d DCA 1985); Thompson v. State, 478 So.2d 562 (Fla. 1st DCA 1985); Francis v. State, No. 84-2028 (Fla. 2d DCA Oct. 4, 1985); Smith v. State, 479 So.2d 804 (Fla. 1st DCA 1985); Saab v. State, 479 So.2d 845 (Fla. 1st DCA 1985); Spivey v. State, No. 84-2545, 84-2576 (Fla. 3d DCA Jan. 7, 1986); Hannah v. State, No. 85-70 (Fla. 4th DCA Jan. 8, 1986); Parker and Hughey v. State, No. 85-856 and 85-882 (Fla. 5th DCA Jan. 16, 1986); and Patterson v. State, No. 85-906 (Fla. 4th DCA Jan. 22, 1986).

Likewise, when more reasons are approved than are disapproved, the District Courts of Appeal affirmed: Hall v. State, 478 So.2d 385 (Fla. 2d DCA 1985); Ross v. State, 478 So.2d 480 (Fla. 1st DCA 1985); Brinson v. State, 478 So.2d

1174 (Fla. 2d DCA 1985); Casteel v. State, No. BC-480 (Fla. 1st DCA Jan. 3, 1986) (the instant case); Gale v. State, No. BD-446 (Fla. 1st DCA Jan. 23, 1986); Phillips v. State, No. BE-79 (Fla. 1st DCA Jan. 23, 1986); and Cason v. State, No. BE-238 (Fla. 1st DCA Jan. 30, 1986).

Curiously when there are an even number of valid and invalid reasons remaining, sometimes the case is reversed: Wiggins v. State, 476 So.2d 257 (Fla. 4th DCA 1985); Davis v. State, 476 So.2d 303 (Fla. 1st DCA 1985); Irwin v. State, 479 So.2d 153 (Fla. 2d DCA 1985); Decker v. State, No. BF-9 (Fla. 1st DCA Jan. 23, 1986); and White v. State, No. 85-503 (Fla. 5th DCA Jan. 23, 1986). At other times, the case is affirmed: Ochoa v. State, 476 So.2d 1348 (Fla. 2d DCA 1985), review pending, No. 67,870; and Brinson v. State, No. BC-45, BC-46, BC-47 (Fla. 1st DCA Nov. 20, 1985) (dicta).

It appears that the appellate courts have blurred the two separate issues in Albritton. The first issue, what the appellate court should do when some reasons are invalid, was addressed by the holding quoted above. The test for this issue is the constitutional test for harmless error beyond a reasonable doubt. The second issue in Albritton, whether to affirm the extent of the departure, is a totally different inquiry. This Court adopted a less restrictive test for this issue, that of an abuse of discretion. It appears that the appellate courts have applied the abuse of

discretion test to the first issue, instead of the harmless error beyond a reasonable doubt standard.

One way to solve the problem would be to employ the per se reversible error method, which was rejected in Albritton. This solution is appropriate where the reviewing court finds it necessary to exert a prophylactic influence upon the lower court, to prevent the error from occurring again by reversing every time that it does. See e.g., Bennett v. State, 316 So.2d 41 (Fla. 1985) (per se reversible error where a comment on silence is made).

Because a per se rule is not presently well-favored by this Court, see e.g., State v. Murray, 443 So.2d 955 (Fla. 1984) (Prosecutorial misconduct may be harmless error); and State v. DiGuilio, No. 65,490 (Fla. Aug. 29, 1985), rehearing pending (Comment on silence may be harmless error). Petitioner submits as an alternative the per se rule, that this Court should reaffirm the harmless error-reasonable doubt test and perhaps reinforce it with additional language to impress upon the appellate courts that it constitutes a far more restrictive test than the abuse of discretion standard.

Such language has been recently stated by this Court:

> The trial judge must conscientiously weigh relevant factors in imposing sentences; in most instances and improper inclusion of an erroneous factor affects an objective determination of an appropriate sentence.

The Florida Bar Re: Rules of Criminal Procedure, No. 67,703

(Fla. Dec. 19, 1985), fn., slip opinion at 3. In this footnote, this Court was referring to the recommendation of the Commission that the sentencing judge be permitted to use a "boiler-plate reason for departure, that he would have departed even if some of the other reasons did not survive appellate review.

The same should be true of appellate courts as they employ the standard of harmless error beyond a reasonable doubt. In most cases, the state will not be able to show beyond a reasonable doubt that the invalid reasons did not effect the departure decision. As the attached survey shows, the appellate courts have not held the state to its very heavy burden. Rather, they have employed a mere counting process to determine whether to affirm or reverse a departure sentence.

The instant case is a perfect example of the appellate court's shortcomings. The briefs were filed prior to Albritton. Respondent's brief argued on authority of Webster v. State, 461 So.2d 965 (Fla. 2d DCA 1984) that any one reason for departure was enough to support the sentence. The First District never requested supplemental briefs on the question of what disposition to make, once it decided that two reasons out of five were invalid. Respondent was allowed to carry its burden without saying anything, and petitioner had no opportunity to argue that the harmless error test had not been met. By its

characterization of the facts as "heinous and repugnant" (Appendix A at 3), a majority of the First District's panel has substituted its judgment for that of the sentencing court. As aptly stated by Judge Zehmer, dissenting:

> I would not affirm this sentence under the reasonable doubt standard for appellate review set down in Albritton v. State, 476 So.2d 158 (Fla. 1985). The state has presented no argument to us to carry its burden under this test. Moreover, I have encountered substantial difficulty in applying the "reasonable doubt" standard to the review of sentencing guidelines departures because that standard, in effect, requires the appellate court to discern what was in the mind of the sentencing judge by weighing the relative importance the trial judge placed on the various factors recited for departure from the guidelines. I am as offended as the majority at "the heinous, repugnant manner of commission" of the offenses committed by appellant, but this quoted language does not appear in the written reasons assigned by the trial judge. Since we are not the sentencing court, we should not be adding it by inference or implication.

(Appendix A at 5-6).

This Court must not allow the appellate courts to "discern what was in the mind of the sentencing judge" and affirm petitioner's sentences. A per se rule of reversal is the only method to deter the appellate court's from this practice. In the alternative, this Court must impress upon the appellate courts the strictness of the harmless error-reasonable doubt standard, and require

the First District to re-weigh the existing reasons for departure in light of this standard (but see Issue II, infra).

ISSUE II

THE FIRST DISTRICT ERRED IN APPROVING THREE OF THE REASONS FOR DEPARTURE AND IN AFFIRMING BOTH 30 YEAR SENTENCES.

The first reason for departure states that petitioner used a knife in both offenses. This is true. The First District realized that it was improper to give this reason as a justification for the 30 year sexual battery sentence, because the use of a knife was inherent in the charge. However, the court affirmed the sexual battery sentence because petitioner received a concurrent 30 year sentence for armed burglary, in which the use of a knife was not an essential element.

It was error to affirm the 30 year sentence for sexual battery just because petitioner also received a concurrent 30 year sentence for armed burglary. The First District should have vacated the sexual battery sentence and remanded for imposition of a sentence within the 17-22 year range, unless other reasons for departure were sufficient to justify the deviation. The concurrent sentence doctrine of Jacobs v. State, 389 So.2d 1054 (Fla. 3d DCA 1980), and the other cases cited therein, should have no application to concurrent guidelines departures, since Florida Rule of Criminal Procedure 3.701(d)(12) requires a sentence to be imposed for each offense, and Florida Rule of Criminal Procedure 3.701(d)(11) requires

"any sentence" outside the range to be supported by written reasons. This Court must vacate the sexual battery sentence and direct that the First District consider whether sufficient reasons for departure exist to support it.

As to the holding that the use of a knife in the armed burglary was a proper reason for departure, the First District has ignored this Court's holdings in Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and Santiago v. State, 478 So.2d 47 (Fla. 1985). In Hendrix, this Court held that to use prior convictions, already scored, again, as reasons for departure, was contrary to the spirit and intent of the guidelines. Likewise, in Santiago, this Court, citing Hendrix, held that the dangerous nature of LSD could not be used as a reason for departure, since its classification as a schedule I drug already made it a serious offense:

> Rule 3.701(d)(11) which became effective on October 1, 1983, provides that reasons for deviating from the guidelines shall not include factors relating to either the instant offense or prior arrests for which convictions have not been obtained. The nature and danger of possession with intent to sell a Schedule I substance is factored into the penalty recommended by the guidelines. To allow those factors to be reconsidered as an aggravation allowing departure from the guidelines is contrary to the spirit and intent of the guidelines.

Id. at 49.

Burglary of a dwelling is a second degree felony.

Section 810.02(3), Florida Statutes. The element of a deadly weapon elevates this crime to a first degree felony punishable by life. Section 810.02(2)(b), Florida Statutes. The category two sentencing guidelines scoresheet in the record with sexual battery while armed as the primary offense, also includes 36 points for the armed burglary as a first degree felony under the additional offense category (R-71). Thus, the knife element has already been scored, and the assessment of 36 points for armed burglary as an additional offense, and cannot be used again as a reason for departure. Reason number one must be stricken. See also Judge Zehmer's dissent (Appendix A at 5).

As to reason number two, that petitioner acted in a calculated manner without moral or legal justification, the First District inexplicably ignored its prior decisions which had held this language to be vague and unrelated to the crime. Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1984), approved, 476 So.2d 163 (Fla. 1985); and Alford v. State, 460 So.2d 1000 (Fla. 1st DCA 1984). Moreover, the First District ignored the unrefuted testimony of petitioner that he had smoked four marijuana joints between noon and 4:00 on the day of the crime, that he had nothing to eat but 15 beers and two more joints during the poker party prior to the crimes, and that he did not remember anything after that until he woke up in the

county jail (T-586-95). The First District also ignored the uncontradicted expert testimony of psychiatrist Joseph Anthony Virzi that petitioner suffered from alcoholism with blackouts, that his mental state was greatly impaired, and that he expressed shock, disbelief, and revulsion when the psychiatrist showed him photographs of the victim (T-619-62; 688-717). In short, the finding of a "calculated manner" has no support in the record and in fact is refuted by the record. This Court must strike reason number two.

Reasons number three and five were properly invalidated by the lower tribunal and will not be addressed here. Reason number four relates to the trauma upon the victim's 15 year old son, who looked out of his bedroom and saw petitioner attacking his mother. It is important to note that the sentencing judge found this circumstance, although he recognized that petitioner was not aware of the boy's presence. The boy testified that petitioner was surprised to see him when he came out of the bedroom after petitioner was in custody, and that petitioner said: "Where did he come from?" (T-282). It is also important to note that petitioner was never charged with nor convicted of any crime against the son.

If approved by this Court, trauma to the victim and his or her family will become an automatic reason for departure in almost every case, especially one involving

sexual battery, and will make a mockery of the guidelines. Even the First District has recognized that there is a certain degree of trauma inherent in every sexual battery. Smith v. State, 479 So.2d 804 (Fla. 1st DCA 1985). In effect, this finding, if approved, would lead to strict liability consequences against the defendant anytime a family member witnessed a violent crime against another family member, even though the defendant had no knowledge that another person was present.

Reason number four must be stricken because it relates to facts for which convictions have not been obtained, Florida Rule of Criminal Procedure 3.701(d)(11), because it penalizes petitioner for something he was totally unaware of, and because it increases the subjectivity in sentencing, contrary to the purpose of the guidelines as stated in Florida Rule of Criminal Procedure 3.701(b).

In summary, then, petitioner has demonstrated that each of the remaining three reasons for departure is invalid. This Court must vacate petitioner's 30 year concurrent sentences and order that he be sentenced within the recommended guidelines range of 17-22 years.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as to Issue I, this Court must adopt a per se rule of reversal anytime a substantial reason for departure is struck by the appellate court. In the alternative, this Court must impress upon the appellate courts the necessity of requiring the state to show beyond a reasonable doubt that the sentence would have been the same. As to Issue II, petitioner requests that this Court vacate both of his sentences, and remand with directions that a guideline sentence be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner on the Merits has been furnished by mail to Ms. Barbara Ann Butler, Assistant Attorney General, Duval County Courthouse, Suite 513, Jacksonville, Florida, 32202, and to petitioner, Mr. John Anthony Casteel, #095289, Post Office Box 500, Olustee, Florida, 32072, this 13 day of February, 1986.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER