IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES PATRICK BARBERA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 68,942

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the prosecution in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County; and Petitioner the defendant there. Respondent was the Appellant in the District Court of Appeals of the State of Florida, Fourth District; and Petitioner was the Appellee in that court. The parties will be referred to as they appear before this Honorable Court, except that Respondent may also be referred to as the State. A copy of the opinion of the Fourth District Court is attached hereto as an appendix (hereinafter "A"). All emphasis is by Respondent unless otherwise indicated.

The following symbols will be used:

"R"	Record on Appeal
"A"	Appendix to Respondent's Brief on the Merits

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented on pages two (2) through six (6) of Petitioner's Brief on the Merits.

POINT INVOLVED

WHETHER THE TRIAL COURT ERRED IN IT'S DEPARTURE BELOW THE SENTENCING GUIDELINES?

SUMMARY OF ARGUMENT

There were no reasons orally announced, and there are no reasons for departure on record. The trial court erroneously delegated it's responsibility to make such written findings. The sentence imposed is far below the guidelines presumptive range.

The judgment of the Fourth District Court of Appeal should be affirmed.

ARGUMENT

THE TRIAL COURT ERRED IN IT'S DEPARTURE BELOW THE SENTENCING GUIDELINES.

The Fourth District Court of Appeals was correct in it's finding that the sentence at issue constituted an improper and invalid departure from the guidelines (A-1).

The relevant scoresheet computations indicated a presumptive sentence range of seven to twelve years (R-31,91). The trial court stated that in offering a reason for departure, the trial court was adopting the alternative sentencing plan drafted by the defense; (R-32), which contained a report of psycholigical evaluation made by Doctor Margaret Townsend, a psychologist (R-63-74).

No written order of departure was made a part of the record. The report of Dr. Townsend, and the alternative sentencing plan, show no reason for departure, and the guidelines scoresheet (R-91), indicates no written reasons. The Amended Commitment Information form in this case, indicates that Petitioner, after 364 days incarceration (with credit for time served), was to be released to the custody of a New York State detoxification program, pursuant to the Alternative Sentencing Plan shown hereinabove (R-94). The attachment to the commitment form includes directions for the fulfillment of the Alternative Sentencing Plan, but contains no written reasons for departure. Nor does the sentencing plan, or any report within the plan,

specifically deliniate any valid reason for departure. The plan is a recommended sentence and nothing more. Appellee suggests that this is the reason the Fourth District Court, in it's decision sub judice (A-2), offered the opinion that the reason for departure in this case was the trial court's acceptance of Petitioner's theory of voluntary intoxication. No other conclusion could be reached since the trial court left no record of it's findings. Respondent respectfully submits that the trial court imposed the instant departure sentence without any valid reason. That is to say, Respondent is not aware of any authority to suggest that voluntary intoxication is recognized by the legislature or this Court as a valid reason for this departure. See Fla.R.Crim.P. 3.701(b)(2)(1985). Moreover, this Court cannot even be certain from the record, as to what the actual reason for departure was, because the trial court never reduced it's findings to writing See Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985); §§3.701(b)(6); 3.701(d)(11) Fla.R.Crim.P. (1985) Also, the trial court's action in this case; by simply allowing a defense witness to draft a sentencing order, amounted to a delegation of it's sentencing authority to a non judicial officer (a psychologist retained by the defense to make a recommendation as to sentencing); (R-64,74). Such delegations of authority are not favored. See Fletcher v. State, 405 So.2d 748, 749 (Fla. 2d DCA 1981).

Petitioner offers State v. Twelves, 463 So.2d 493 (Fla.

2d DCA 1985), as authority for the contention that voluntary intoxication or alcohol abuse is a valid reason for departure. The Twelves case is different from that sub judice. In Twelves, the trial court specifically articulated valid reasons for departure. See Twelve, supra, 463 So.2d at 493. However, the trial court below delegated it's sentencing authority, offered no written reasons for it's departure, and simply adopted the sentencing plan of the defense. The fact that one district court, in one particular case, found that the defendant's mental disorder, as a written reason for departure, was sufficient, does not mean that it was proper in this case, for the trial judge to sentence a person convicted of attempted first degree murder, to a term of probation. See Fla.R.Crim.P. §§3.701(b)(2); §3.701(b)(3) (1985).

Rehabilitation, as a goal in sentencing, should be subordinate to punishment Fla.R.Crim.P 3.701(b)(2). The penalty imposed should reflect the severity of the offense Fla.R.Crim.P.3.701(b)(3). Here, Petitioner stabbed, and very nearly killed his wife (R-20,28,35). The fact that alcohol abuse by an attorney was the reason for a mitigation of his discipline by the Florida Bar does not suggest that voluntary intoxication is a valid reason for departure from the guidelines. Discipline by the Florida Bar is not a criminal proceeding. Similarly, the case of Ross v. State, 474 So.2d 1170 (Fla. 1985), as offered by Petitioner; while sound in it's reasoning, is not dispositive

here. The Ross case involved the issue of a defendant's right to offer evidence of mitigating factors in a capital case, where the death penalty is a potential sentence. That is not the issue in the instant case. In fact, since Appellant entered a plea of guilty, it can be assumed that he waived his right to assert a defense of voluntary intoxication Fla.R.Crim.P. 3.172(iii),(iv),(v)(1985). Thus, Appellant's life was never jeopardized by any curtailment of his right to offer evidence in mitigation.

In sum, the trial court sub judice completely delegated it's responsbility and duty to set a clear, convincing, and valid reason for departure. As a result, no reasons appear on the record in any form. This resulted in the imposition of a term of probation, in a case where the defendant pled guilty to a brutal attempted murder. The actual jail time served by Petitioner in this case was one-seventh of the minimum term of incarceration recommended by the sentencing guidelines. In such circumstances, the ruling of the Fourth District in the instant case must be affirmed See Hendrix v. State, 475 So.2d 1218, (Fla. 1985); Albritton v. State, 476 So.2d 158 (Fla. 1985); and State v. Mischler, 11 F.L.W. 139 (Fla. April 3, 1986).

Petitioner has asked this Court to allow the withdrawal of his plea in the event that the decision of the Fourth District Court is affirmed. Respondent submits that the withdrawal of Petitioner's plea of guilty is a matter more appropriate for the

attention of the trial court at such time that the decision of this Court provides the trial court with guidance as to further proceedings in this case.

The opinion of the Fourth District Court should be affirmed.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Honorable Court affirm the decision of the Fourth District Court of Appeal sub judice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true copy of the foregoing Respondent's Brief on the Merits has been furnished by courier to, JEFFREY L. ANDERSON, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach,