

IN THE SUPREME COURT OF FLORIDA

MICHAEL ANTHONY SCOTT,

Petitioner,

vs.

CASE NO. 69,234

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW FROM THE FIRST  
DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Michael Anthony Scott, the criminal defendant and appellant below in Scott v. State, 469 So.2d 865 (Fla. 1st DCA 1985) ("Scott I") and Scott v. State, \_\_\_ So.2d \_\_\_ (Fla. 1st DCA 1986), 11 F.L.W. 1684 ("Scott II") will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

References to the records on appeal will be designated as in petitioner's brief.

Pursuant to Fla.R.App.P. 9.120(d) and 9.220, conformed copies of the two aforementioned decisions in Scott v. State are appended to this brief.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's "statement of the case and facts" as reasonably accurate portrayals of the legal occurrences and the evidence adduced below for the purpose of resolving the narrow legal issue presented upon certiorari.

SUMMARY OF ARGUMENT

Because the trial court advanced at least one valid reason for entering the instant sentencing guideline redeparture, this sentence should be upheld.

ISSUE

THE JUDGE BELOW PROPERLY DEPARTED FROM  
THE SENTENCING GUIDELINES.

ARGUMENT

In resentencing petitioner pursuant to the First District's mandate in Scott I, the judge below advanced the following as his first reason for a redeparture:

1. Defendant created an extreme risk to the safety of many citizens in his attempt to escape apprehension following commission of the crime.

Scott II, 11 F.L.W. 1684. Petitioner tacitly concedes, and the State agrees, that this first reason constituted a clear and convincing predicate for the sentencing redeparture. Cf. Lerma v. State, \_\_\_ So.2d \_\_\_ (Fla. 1986), 11 F.L.W. 473, 474 ("the trial court did not abuse its discretion in finding that excessive brutality constitutes a 'clear and convincing' reason to justify departure"); compare McGouirk v. State, \_\_\_ So.2d \_\_\_ (Fla. 1986), 11 F.L.W. 463.

The judge below advanced the following as his second reason for the redeparture:

2. The sentencing guidelines recommendation of 5 1/2 to 7 years is insufficient for retribution, deterrence, rehabilitation, and for the safety of the public.

Scott II, 11 F.L.W. 1684. Relying upon Scurry v. State, 489 So.2d 25 (Fla. 1986) and Williams v. State, \_\_\_ So.2d \_\_\_ (Fla. 1986), 11 F.L.W. 289, petitioner argues that this second reason

does not constitute a proper predicate for the sentencing redeparture because it merely "expresses some disagreement with the recommended guidelines range" ("Brief of Petitioner on the Merits," p. 5). In some cases - particularly those in which it is the only reason advanced - such a reason may indeed constitute nothing more than an expression of judicial dissatisfaction. However, in other cases, such as this one, such a reason should be seen as merely qualifying another valid reason for a departure. "The sentencing guidelines recommendation...is insufficient" to effect certain traditional sanctioning goals, a trial judge finds. WHY? Because, as the judge also finds, the "defendant created an extreme risk to the safety of many citizens in his attempt to escape apprehension following commission of the crime." This process, the State would assert, is entirely legitimate. See Lerma v. State, 11 F.L.W. 473, 474, in which this Court held that "[t]he trial court did not abuse its discretion in finding that the commission of two separate acts of sexual battery constitutes a clear and convincing reason to support departure" because Fla.R.Crim.P. 3.701(b)(3) provides that "[t]he penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense," even though it had earlier rejected a departure nakedly predicated upon a trial judge's belief that "the recommended sentence under the guidelines is not commensurate with the seriousness of the crime," Williams v.



State, 11 F.L.W. 289, 290.

The judge below advanced as his third and final reason for the redeparture:

3. Defendant's criminal history indicates that a prison term of 5 1/2 to 7 years is inadequate punishment for this defendant.

Scott II, 11 F.L.W. 1684. Petitioner tacitly contends, and the State agrees, that this third reason did not constitute an appropriate predicate for the sentencing redeparture because it merely reflects upon his prior record, which was already computed in ascertaining his recommended sentence, Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

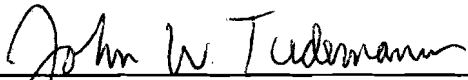
The First District, although finding the first two reasons advanced for the redeparture valid, still ordered a third sentencing based upon the invalidity of the third reason alone, citing this Court's decisions of Albritton v. State, 476 So.2d 158 (Fla. 1985) and State v. Mischler, 488 So.2d 523 (Fla. 1986). The State would submit that this constitutes a misreading of those decisions and that any time an initial departure sentence is reversed and the court below nonetheless elects to redepart upon resentencing based upon at least one concededly valid reason, such a redeparture should be upheld upon appeal. For an appellate court to remand for a third sentencing in such circumstances is, frankly, to disparage and unnecessarily burden the trial court; moreover, a defendant may always timely move the trial court for a reduction of sentence under Fla.R.Crim.P. 3.800(b). The State accordingly asks this Court to affirm the instant redeparture. Fla.R.App.P. 9.040(a).

CONCLUSION

WHEREFORE respondent, the State of Florida, by and through the undersigned counsel, respectfully submits that the sentence entered by the trial court must be REINSTATED.

Respectfully submitted,

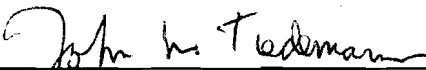
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing Brief of Respondent on the Merits has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32302, by hand delivery, this 24th day of September, 1986.

  
\_\_\_\_\_  
John W. Tiedemann  
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